

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

737
No. 23,493

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

HOWARD P. HORTON,
Plaintiff-Appellant,

v.

EDWARD J. BRENNER,
Commissioner of Patents,
Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the District of Columbia

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 5 1959

Nathan Paulson
CLERK

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APPENDIX

Relevant Docket Entries

December 18, 1967	Complaint of Plaintiff
February 15, 1968	Answer of Defendant
June 11, 1969	Transcript of Proceedings
June 11, 1969	Opinion of the Court - J. Holtzoff
June 18, 1969	Findings of Fact and Conclusions of Law J. Holtzoff
June 18, 1969	Judgment Dismissing Complaint with Costs against Plaintiff
August 15, 1969	Notice of Appeal by Plaintiff

COMPLAINT.

Complaint
(Letters Patent)

1) Jurisdiction of this Court depends upon the statutes of the United States relating to the grant and issuance of Letters Patent of the United States and particularly upon Title 35, United States Code, Section 145.

2) No appeal has been filed in the United States Court of Customs and Patent Appeals. The complaint herein is being filed within sixty (60) days of the decision of the United States Patent Office Board of Appeals and in accordance with the law and rules provided by Rules 171, 197, 303 and 304 of the Rules of Practice of the United States Patent Office.

3) Plaintiff, Howard P. Horton, is an individual residing in Sarasota, Florida, whose address is 1154 Westway Drive, Sarasota, Florida.

4) Defendant, Edward J. Brenner, is a citizen of the United States, is the Commissioner of Patents of the United States, and as such a legal resident of the District of Columbia, and is being sued herein in his official capacity as the Commissioner of Patents.

COMPLAINT

5) On April 29, 1966, Howard P. Horton, plaintiff, filed in the United States Patent Office an application for a Design Letters Patent on an invention entitled STEAM BATH, which application was given Serial No. D-2065, the application was filed on April 29, 1966 and was a continuation-in-part application of Design Patent Application Serial No. D-85-812 filed June 21, 1965 which became abandoned.

6) Said application No. D-2065 was filed and duly prosecuted in accordance with the laws of the United States and with the Rules of Practice of the Patent Office.

7) Said application has been passed upon by the Primary Examiner, who wrongfully refused to allow the claim of the said application, and the Primary Examiner finally rejected the following claim:

CLAIM

--The ornamental design of a steam bath as shown
and described. --

8) An appeal was taken to the Patent Office Board of Appeals, which Tribunal, by its decision of October 18, 1967 affirmed the action of the Primary Examiner as to the rejection of the aforesaid

COMPLAINT

claim, and by this action, defendant refused and still refuses to grant a patent on said design patent application containing said claim.

9) The invention of the application for Design Letters Patent involved in this proceeding relates to a novel design for a steam bath characterized in its overall ornamental features and having a non-angular appearance and a door which curves upwardly over the top of the cabinet and curves downwardly and inwardly to almost the bottom of the cabinet and also curves around the sides of the cabinet which, in overall effect, produces a novel, rounded, streamlined, and pleasing appearance.

10) The above recited claim of said application is considered to be patentable by plaintiff.

11) Plaintiff asserts it was error in fact and in law on the part of the defendant, the Primary Examiner, and the Patent Office Board of Appeals to refuse to allow the claim of the application, whereby the plaintiff has been deprived of property or rights to which he is lawfully entitled.

12) The invention of said application is new and useful and was not known or used by others in this country before the

COMPLAINT

invention thereof by Howard P. Horton, the plaintiff, and was not patented or described in any printed publication in this or any foreign country before the invention thereof by said Howard P. Horton or more than six (6) months prior to said application and not in public use or on sale in the United States for more than a year prior to said application and not patented in any country foreign to the United States on an application filed by said Howard P. Horton or his legal representatives prior to said application and has not been abandoned.

WHEREFORE the plaintiff prays as follows:

1) For a decree that plaintiff Howard P. Horton is entitled according to law to receive Design Letters Patent of the United States for the aforesaid invention as defined by the claim of said application.

2) For a decree, pursuant to the United States Code, Title 35, Section 145, that the Commissioner of Patents be directed to allow the aforesaid claim of said application and such other claim as upon hearing this Honorable Court may find patentable and to issue to plaintiff, Howard P. Horton, United States Design Letters Patent containing said claim.

3) That plaintiff have such other and further relief as the nature of the case may require and as to this Honorable Court may seem meet.

ANSWER TO COMPLAINT

To the Honorable the Judges of the United States District Court
for the District of Columbia

1-6. Defendant admits the allegations of these paragraphs
of the complaint.

7. Defendant denies the allegations of this paragraph
of the complaint, for reasons hereinafter given.

8. Defendant admits the allegations of this paragraph
of the complaint.

9. Defendant admits that the allegations of this paragraph
of the complaint are analogous to those made in application Serial
No. D-2065, but defendant denies said allegations, for reasons
hereinafter given.

10. Defendant admits that plaintiff considers the claim of
application Serial No. D-2065 to be patentable, as alleged in this
paragraph of the complaint, but defendant denies said allegation,
for reasons hereinafter given.

11-12. Defendant denies the allegations of these paragraphs
of the complaint, for reasons hereinafter given.

ANSWER TO COMPLAINT

FURTHER ANSWERING defendant denies that plaintiff is entitled to receive design letters patent of the United States, as requested in the prayers of the complaint, because the invention as defined by the claim of application Serial No. D-2065 is not patentable under the law, for the reasons given and in view of the prior patent and publication, cited and relied upon by the examiner in the Examiner's Answer, and by the Board of Appeals in its decision in said application. Profert of said patent, publication, answer and decision is hereby made.

P R O C E E D I N G S

THE DEPUTY CLERK: Case of Howard P. Horton versus the Commissioner of Patents.

THE COURT: You may proceed, gentlemen.

MR. RAPTES: Your Honor, my name is Ted Raptès. I am attorney for the Plaintiff. This is a civil action brought under 35 U.S.C. 145 in which the Plaintiff is the applicant of U. S. Patent Application Serial No. D 2065 filed on April 29, 1966, for a steam bath design. The applicant was refused a patent by the Patent Examiner and the Patent Office Board of Appeals.

The action is brought to seek an adjudication by this Court that the Defendant be authorized to issue to the Plaintiff a design patent, the claim of which reads as follows: "The ornamental design of a steam bath as shown and described."

At this time I would like to offer into evidence certified --

THE COURT: You make an opening statement and the Government makes an opening statement, and then we start the evidence. You do not offer evidence at this stage, you just make your opening statement.

MR. RAPTES: All right.

THE COURT: I read your trial brief. There is a drawing attached as an exhibit to the trial brief showing the

design, is there not?

MR. RAPTES: Yes. It is the same drawing that is in the application file.

Now the invention deals with the novel ornamental design of a steam bath.

THE COURT: Just what is a steam bath?

MR. RAPTES: I was just going to refer to it. We have our unit here that we were trying to obtain a patent on.

THE COURT: It is a portable bath?

MR. RAPTES: Let me bring it up and show it to you.

THE COURT: You may do that if you wish.

MR. RAPTES: This is the steam bath that we are referring to and it is a sauna type bath. This is the unit that we were trying to obtain a design patent for and it is a type that is used in the home. It can be put in the bedroom or wherever and the person gets in.

THE COURT: I cannot hear you when you look back. Face the Court.

MR. RAPTES: I was trying to point out the cabinet.

THE COURT: You have to face the Court when you are talking and not face the back wall.

It is used where?

MR. RAPTES: It is used in the home. It is a portable unit that is bought and taken into the home.

THE COURT: You mean it is used in homes that have

no bathtubs, is that it?

MR. RAPTES: It is not a bath as such, it is a sauna bath. There is a steam created in the unit itself.

THE COURT: I see. This is not an ordinary bath tub.

MR. RAPTES: No.

THE COURT: I misunderstood you.

MR. RAPTES: It is a sauna type bath unit and the person sits in the cabinet and the steam swirls up around him.

THE COURT: What does the design consist of?

MR. RAPTES: The design is the cabinet itself, the overall unit. Now it is characterized, as you can see, by an overall tear drop shape which has --

THE COURT: You mean the shape of the unit is the design?

MR. RAPTES: The cabinet itself. This is the design that we are trying to patent. It is the overall appearance of the cabinet which we claim is a novel and patentable design.

THE COURT: Isn't that an unusual type of application for design patent? What you are really trying to patent is the article in the guise of getting a design patent on it, aren't you?

MR. RAPTES: No, we are not trying to patent any functionality of this cabinet, it is merely the overall appearance of the cabinet. This is a subject matter which is capable of being patented under the patent laws relating to

designs.

A design to be patentable must disclose a design that is new, original and ornamental and it must not be anticipated by the prior art and it should be inventive and beyond the skill of the ordinary designer or draftsman. Furthermore, and this is an important point, it must not be obvious which is an aspect of the patent law that was added in the Patent Act of 1952.

THE COURT: I think it was always in existence.

MR. PAPTES: It was always in existence, it was codified.

THE COURT: It was always in existence under a different phraseology.

MR. PAPTES: Now Congress intended through the patent acts to encourage ornamentation and beautification of manufactured articles.

THE COURT: Let's not go into the basic fundamental principles, just argue this case.

MR. PAPTES: Now the question involved in this case is the obviousness of the design over the prior art. One aspect that we intend to prove is commercial success which we submit should enhance the argument for patentability, but we admit that if the design lacks invention the commercial success cannot fill the void.

THE COURT: You are right on both points.

MR. RAPTES: The question of design is a difficult one. With respect to designs the test is inheritably a visual one.

THE COURT: Of course.

MR. RAPTES: We say the question is the design obvious to an ordinary intelligent person. In the instant case we submit that the --

THE COURT: Very well. I think I get your point.

MR. RAPTES: We intend to present evidence that the Plaintiff's design is novel, ornamental and original. We also are going to submit evidence on the commercial success.

THE COURT: Yes, you mentioned that.

MR. RAPTES: And also copying of the design by competitors.

THE COURT: I am not quite familiar with this type of article. What are these steam baths used for?

MR. RAPTES: Well, they are somewhat therapeutic in nature.

THE COURT: Therapeutic?

MR. RAPTES: Yes.

THE COURT: Are they used in homes or doctors offices or where?

MR. RAPTES: Normally they are used in homes but they can be used in hospitals and not necessarily in doctors offices. I am sure you are familiar --

THE COURT: Ordinarily where are they used?

MR. RAPTES: In the home. I am sure you are familiar with sauna baths; it is a steam type treatment in a cabinet and this is the cabinet to be used in the home.

THE COURT: Thank you.

I will hear the Government now.

MR. SEARS: May it please the Court, I would like to introduce Mr. Raphael Lupo, a new member of the Solicitor's staff. He has been admitted to practice before this Court and will represent the Commissioner in this trial.

THE COURT: The Court will be very glad to hear you, Mr. Lupo.

MR. LUPO: Thank you very much, Your Honor.

If it please the Court, I would like to start first by summarizing briefly the position of the Patent Office in this case. The Patent Office after reviewing the Plaintiff's application has concluded that it finds no patentable significance in the design of the Plaintiff in view of the prior art. Now the prior art in this case consists of two items.

THE COURT: Do you have the usual booklet?

MR. LUPO: Yes, I do, Your Honor.

THE COURT: You might hand it up.

THE DEPUTY CLERK: Defendant's Exhibit 1.

(Defendant's Exhibit No. 1
marked for identification.)

MR. LUPO: Thank you very much. I ask that it be

received into evidence.

THE COURT: You may proceed.

MR. LUPO: The prior art, Your Honor, consists of two items; the first is a patentee named Cosper which shows a sauna steam cabinet basically of the same shape as that of the Plaintiff's design. There is one difference that was noted by the Examiner between the Plaintiff's design and that of Cosper and that difference did not reside in the outside shape of that cabinet but resided in the way the door of the cabinet sat on the remainder of the cabinet; in other words, where the door joined the cabinet, where the seam comes into the cabinet.

The Plaintiff's design shows a curved seam at this point whereas the designer Cosper shows a flat seam for a flat door back. The Examiner in considering Cosper concluded on Cosper alone that it would be obvious to modify that seam of Cosper to be curved for he felt that this was suggested by the outside shape of the door of the Cosper cabinet.

THE COURT: Tell me again the difference.

MR. LUPO: Yes, Your Honor. That difference resides in the way the back of the door rests on the remainder of the cabinet. The Cosper surface rests on a flat plane whereas the Plaintiff's cabinet resides on a curved seam.

THE COURT: Tell me again the difference of the prior art cabinet and the applicant's cabinet.

MR. LUPO: Yes, Your Honor. Again it is in the way the back of the front door seats on to the cabinet. The joining seam between the door and the cabinet in the prior art is a flat seam, a flat door -- in Plaintiff's application it is a curved seam.

THE COURT: You mean the door is curved?

MR. LUPO: The back side of the door is curved. Both doors are curved.

THE COURT: You mean the fastening?

MR. LUPO: Yes, Your Honor.

THE COURT: I get your point now.

MR. LUPO: Now the Examiner concluded that it would be obvious by Cosper alone to modify this seam to be curved because Cosper's outside of his door was also curved and he felt that this would suggest modifying the seam. But even in the absence of that we have a secondary reference known as the sporting goods dealer item which shows that it is old and well known in the design of sauna baths to have a curved seam on the back of a sauna bath door.

The Examiner then concluded that it would also be obvious to modify Cosper, that seam of Cosper to be curved in view of that which is shown in the sporting goods item that you have in front of you, Your Honor. It is on the left hand upper corner.

Now the Patent Office in this case wishes to take expressly that position as set forth by the Examiner as was

affirmed in a procurium affirmance by the Board of Appeals.

I would like to add that in addition to what Mr. Raptis has said about the patentability of designs, not only must they be new and useful but it must be remembered that Title 35, Section 289 thereof, makes it clear that a design patentee is also entitled to protection against any colorable variation of his design.

Now the Examiner in this case, Your Honor, has concluded or did conclude that the two designs were strikingly similar, the design of the Plaintiff as well as Cosper. Being strikingly similar the Patent Office submits that the Plaintiff's design is a colorable variation of the Cosper patent and therefore should not be so patented.

Concerning the case law of designs we would also like to call to Your Honor's attention the case of *in re Johnson* which is cited at 175 Federal 2d, 791. There were three observations made in that case that I would like to briefly summarize. The first was in determining whether or not a design is patentable -- it is the eye of the average observer, if the average observer considers the design to be a new design rather than a mere modification of the pre-existing design.

The second point was that the eye of the judge is to be considered as the eye of the observer.

The third point which we feel is most critical with

regard to this case is that mere modification of the surfaces of the prior art design which may have been square, mere modification to round it is not of the patentable nature.

The subject matter in re Johnson happened to reside in a pair of pliers that had square surfaces which were changed to rounded surfaces and the Court held that that design was not patentable.

One last comment I would like to make, I would like to quote the Board of Appeals. They only made one comment and we feel that it summarizes what this case is all about. I quote therefrom: "We need to add nothing more to what the Examiner has stated except to point out that design patentability cannot be predicated on a design which is so slightly different from the prior art that close examination is required to reveal the difference."

Thank you, Your Honor.

THE COURT: Before you resume your seat I would like to ask you a question. Is there any doubt that a design patent may be granted on an article of manufacture?

MR. LUPO: A design patent may be granted on an article of manufacture, yes, Your Honor.

THE COURT: Because most design patents are not on articles of manufacture, they are something besides the article.

MR. LUPO: That is right; they are aimed at the

appearance of the device, but a utilitarian device can have an aesthetically pleasing appearance.

THE COURT: You may proceed, Mr. Raptis, and offer your evidence.

MR. RAPTES: At this time I would like to offer into evidence as Plaintiff's Exhibit No. 1 the certified file and history in the record of the Patent Office.

THE COURT: Very well. That will be admitted.

That is the file wrapper.

MR. RAPTES: The file wrapper.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 1 marked for identification and received in evidence.

(Plaintiff's Exhibit No. 1
marked for identification
and received into evidence.)

THE COURT: You may proceed.

MR. RAPTES: I would like to call Mr. Howard Horton to the stand.

Whereupon,

HOWARD HORTON

was called as a witness on his own behalf and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAPTES:

Q Would you give your name and address, please.

A My name is Howard Horton. I live at 1154 Westway

Drive, Sarasota, Florida.

Q What is your present occupation?

A I am in the real estate development business.

Q Previous to the business you were in can you name the company that you are associated with?

A I have been associated with the real estate and building business and also Relax-A-Sauna and manufacture of portable steam cabinets.

Q Are you the applicant of U. S. Design Patent Application Serial No. D 2065?

A I am.

Q Will you relate the circumstances surrounding your creation of the design for which you applied for a design patent?

A I used to fairly often go take steam baths at the Pentagon Athletic Club. I have taken steam baths in various other places, barber shops, and I thought that the idea of a portable streamlined, well designed, attractive steam cabinet for use in the home would be a marketable product. I proceeded to design a tear drop shaped cabinet and later got the thing prototyped and got into production manufacturing.

Q You say you got into production manufacturing. Was this with Relax-A- Sauna, Inc.?

A Yes, sir.

Q What was your association with that company? What

was your position?

A I was president of the Relax-A-Sauna.

MR. RAPTES: I would like to mark this cabinet as Plaintiff's Exhibit 2.

THE COURT: That will be admitted in evidence.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 2 marked for identification and received into evidence.

(Plaintiff's Exhibit No. 2
marked for identification
and received in evidence.)

BY MR. RAPTES:

Q Mr. Horton, Plaintiff's Exhibit 2, would you identify it?

A That is one of the cabinets we were manufacturing, yes, sir.

Q You say "we." Relax-A-Sauna, Inc.?

A Relax-A-Sauna, Inc.

Q Does this cabinet, Plaintiff's Exhibit No. 2, incorporate the design that you created?

A Yes, sir, it does.

Q Could you describe the features of the design?

A I was striving for curves, smooth effect, teardrop shape, something that would be ornamental and attractive as well as a utility item and came up with this teardrop shape. It had to conform to a certain size to fit the human anatomy so we were restricted there. To move it around it had to be

small enough to go through doorways. I stuck to the idea of the teardrop shape and streamlining and having flowing lines all the way around. The door flows into the rest of the cabinet, goes all the way to the floor in a graceful arc.

Q How successful was Relax-A-Sauna, Inc., in marketing this particular cabinet?

A We sold approximately 2,000 units.

Q Are you selling them today?

A No, sir, we are not.

Q What is the reason that you are not selling them?

A Well, there are several reasons we are not selling them today. Primarily some of the people that we sold to started copying our unit and instead of being distributors for our unit became competitors using our design.

Q Have you seen any of the competitive copied units?

A Yes, sir, I have.

Q Where were they?

A Well, I saw one in Edinburg, Indiana, and I saw one in Chicago.

Q Who were the manufacturers of those units?

A Bo-Witt Products in Edinburg, Indiana, and the John J. McKune & Sons, Inc., had manufactured the other one.

Q Did you actually see the unit itself that these competitors made?

A Yes, sir, I did.

Q Was that unit substantially identical to the one that you manufacture?

A It was.

THE COURT: Any questions?

MR. LUPO: Yes, Your Honor.

CROSS EXAMINATION

BY MR. LUPO:

Q Mr. Horton, how would you describe the outside of your cabinet, what would you say as to its shape?

A I would say it is generally curving. I would say that there are no straight lines on the entire cabinet except the base.

Q Would you say that it was basically perpendicular to the ground, the backside now?

A Generally.

Q Would you also make the same statement of the two sides of the cabinet, that they are generally perpendicular to the ground?

A Except for the curves.

Q Now you characterize the shape as a teardrop, is that correct?

A I found that the best description.

MR. LUPO: No further questions, Your Honor.

THE COURT: Very well. You may step down.

Do you have anything more?

MR. RAPTES: Yes. I have one more witness.

Mr. H. B. Billings, please take the stand.

THE COURT: Just a moment. What testimony are you going to elicit from the next witness?

MR. RAPTES: Commercial success in copying with --

THE COURT: We already have the evidence.

MR. RAPTES: We have brochures of the competitors that we would like to put into evidence and we also would like to put the actual unit that is in the patent, the prior article. We have those there, we would like to put that in evidence.

THE COURT: We will recess at this time for lunch. I think you should be able to end your case in a few very brief moments.

MR. RAPTES: Yes, sir.

(Whereupon, at 12:28 p.m., the Court recessed, to reconvene at 1:45 p.m.)

- - -

AFTERNOON SESSION

1:45 p.m.

THE COURT: We will resume the case on trial.

MR. RAPTES: Harmon D. Billings, take the stand, please.

Whereupon,

H. D. BILLINGS

was called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAPTES:

Q Give your name and address, please.

A H. D. Billings, 430 Monroe Drive, Sarasota, Florida.

Q What is your present occupation?

A General contractor in real estate.

Q Do you know the inventor of the design in question, Howard P. Horton?

A Yes, I do.

Q What has been your association?

A I have been a partner with him in the Relax-A-Sauna steam bath corporation, vice president.

Q You say you are the vice president of the corporation?

A Yes.

Q What are your duties as vice president?

THE COURT: That is enough of that.

BY MR. RAPTES:

Q In your capacity as vice president did you have occasion to examine competitors literature?

A Yes, I did.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 3 marked for identification.

(Plaintiff's Exhibit No. 3
marked for identification.)

BY MR. RAPTES:

Q I show you Plaintiff's Exhibit 3. Would you identify it.

A Yes. That is the Cosper unit for the Battle Creek Sauna.

Q Who is Battle Creek?

A They are a manufacturer of health products which includes the sauna bath.

THE COURT: That speaks for itself.

BY MR. RAPTES:

Q Does that brochure show a cabinet which is similar to the Cosper patent?

A Yes, it does.

Q Is that cabinet presently in the courtroom?

A Yes, it is.

Q Will you point it out?

A The cabinet on the right.

Q And you refer to it as the Cosper unit?

A That is right.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 4 marked
for identification.

(Plaintiff's Exhibit No. 4
marked for identification.)

BY MR. RAPTES:

Q I hand you Plaintiff's Exhibit 4. Would you identify
it, please.

A This is a unit manufactured by the Battle Creek
Equipment Company.

Q Would you identify and characterize the unit?

THE COURT: No, no, it has been identified. He has
identified the exhibit. Let's move along.

BY MR. RAPTES:

Q Well, I wanted to establish that it is a copied unit.

THE COURT: I understand that. I can look at the
picture myself. You don't have to have a witness to state
what the picture shows.

MR. RAPTES: I will offer Plaintiff's Exhibits 3 and
4 into evidence.

THE COURT: Let them be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibits 3 and 4
received into evidence.

(Plaintiff's Exhibit Nos. 3 and
4 received into evidence.)

THE COURT: You have several exhibits?

MR. RAPTES: Yes.

THE COURT: Ask one question concerning all of them if you want to identify them so we can save time.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 5 marked for identification. Also, Plaintiff's Exhibits 6-A, 6-B and 6-C marked for identification.

(Plaintiff's Exhibit Nos. 5 and 6-A, 6-B and 6-C marked for identification.)

BY MR. RAPTES:

Q I hand you Plaintiff's Exhibit 5 and Plaintiff's Exhibits 6-A, 6-B and 6-C. Would you identify them, please.

A Yes. These are all copies of our unit by various manufacturers around the country. I say our unit, the Relax-A-Sauna unit on the left.

MR. RAPTES: I offer Plaintiff's Exhibit No. 3 into evidence which is the Battle Creek unit identified as the one on the right up there.

THE COURT: That will be admitted.

MR. RAPTES: I offer Plaintiff's Exhibit No. 4 which is the Battle Creek unit which is a copy of the Plaintiff's design.

THE COURT: Now what is the relevancy of these exhibits, Mr. Raptès?

MR. RAPTES: We are trying to show by this evidence

that competitors have copied --

THE COURT: In other words, if you had a patent, they would be infringers, is that your point?

MR. RAPTES: They would be infringers but we are trying to show that the design has been so successful --

THE COURT: I am just asking you a question. According to your contention, if you had received a patent, these would be infringers, is that it?

MR. RAPTES: Yes.

THE COURT: I see.

MR. RAPTES: I offer Plaintiff's Exhibit 5 which is another copy of the Plaintiff's unit by another manufacturer.

I offer into evidence Plaintiff's Exhibits 6-A, 6-B and 6-C. One is a brochure of another competitor which has copied the unit and letters to the competitors informing them that they have copied the unit and to cease and desist and an order from the competitor for one of the Plaintiff's units.

THE COURT: Let them all be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibits 5 and 6-A, 6-B and 6-C received into evidence.

(Plaintiff's Exhibit Nos. 5, 6-A, 6-B and 6-C were received into evidence.)

BY MR. RAPTES:

Q Mr. Billings, in your capacity with the corporation did you find that the sales of the Plaintiff's unit were

successful? Was there a public acceptance of the unit?

A Of which unit?

Q Of the one in question, Plaintiff's design.

A Yes, sir.

Q Relax-A-Sauna.

A Yes.

Q Were there any purchasers that made comments about the unit as to why they bought it?

A Yes, there were. They thought that it was acceptable in their home; it went along with the decor, it was modern looking, it was non-therapeutic looking, it was acceptable in nearly any room in the home such as a den or a bedroom.

Q What happened after competitors began copying your unit?

A Our sales decreased.

Q How did the information of copying come to your attention?

THE COURT: I don't think that makes any difference, how it comes to their attention.

MR. RAPTES: I would like to mark this.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 7 for identification.

(Plaintiff's Exhibit No. 7
marked for identification.)

MR. RAPTES: I would like to offer the Cosper unit, which is Plaintiff's Exhibit 7, into evidence.

THE COURT: It will be admitted.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 7 received into evidence.

(Plaintiff's Exhibit No. 7 received into evidence.)

BY MR. RAPTES:

Q Mr. Billings, I direct your attention to Plaintiff's Exhibits 2 and 7.

THE COURT: Now the white one represents what?

MR. RAPTES: The white one represents the prior art unit in the Cosper patent.

BY MR. RAPTES:

Q Comparing the two units, would you in your opinion consider them substantially the same or would you consider them different?

A I would consider them different.

Q For what reason?

A Well, first of all the Cosper unit on the right is very angular in design; it has a piano hinge on the left hand side as you see, it has all straight lines, it has a shelf at the bottom -- all radical turns, 90 degree turns in most cases or nearly so.

Q And compared to Plaintiff's Exhibit 2, how would you characterize that unit?

A All the turns are eased, radius is very gentle on the side and the edges, the door has a very gentle slope to

it, the door goes all the way to the floor whereas the other unit has a shelf at the bottom, the sides of the unit are rounded or have a radius whereas the other unit is straight.

CROSS EXAMINATION

BY MR. LUPO:

Q Mr. Billings, am I correct in stating that you have stated that these exhibits are copies of the Plaintiff's design?

A Yes.

Q Other than the Exhibits 6-A, 6-B and 6-C which you claim was an admission by a manufacturer's copy, do you have any factual proof of any acts of copying on the part of any of the other manufacturers? Do you know for a fact that any of these advertisements that you see here were actually copied from the Plaintiff's design?

A Yes.

Q Would you elaborate on that?

THE COURT: No, no. You have to ask questions.

MR. LUPO: Yes, Your Honor. I am sorry.

BY MR. LUPO:

Q Would you mind telling us then in your opinion with regard to Plaintiff's Exhibits 6-A, 6-B and 6-C why the company there involved quit making the sauna bath?

A 6-A, B and C.

Q Those exhibits came into evidence rather quickly

and the letter that I speak of is a communication to Mr. Billings, yourself, from Mr. Richard Linberg where he advises that they have discontinued the sale of the item. Now what I asked you, sir, I would like to know if you have any idea why they discontinued the sale of that item.

A They discontinued sale of the item because they were put on notice by our attorney.

Q Although it does not state so in the letter, is that correct?

A I have not read the letter.

Q Well, could we hand up a copy of the letter?

THE COURT: I think it is a little far afield what somebody else has done.

MR. LUPO: Yes, Your Honor.

BY MR. LUPO:

Q I would like you now to take a look at a copy of the Cosper patent which is part of Defendant's Exhibit 1.

THE COURT: Just a moment. I don't think this witness has been qualified as a patent expert, he didn't give expert testimony.

MR. LUPO: Yes, Your Honor. He did state that he felt --

THE COURT: He didn't give expert testimony and I don't think you should examine him as an expert.

BY MR. LUPO:

Q May I ask you, Mr. Billings, since you are familiar with the manufacture of these items, in what colors do they make these cabinets?

A Which cabinets?

Q Plaintiff's.

A Made them in several different colors -- blue, what you see there, candy apple red, beige, turquoise, pastel yellow.

Q Fine. Now, Mr. Billings, do they ever make the seam of that cabinet the same color as the remainder of the cabinet? Has the Plaintiff ever made that seam the same color?

A Made the what?

Q The seam. Over on this cabinet here you have a white seam on a blue cabinet. Have you ever made those cabinets with the seam the same color as the remainder of the cabinet?

A Yes, we have.

THE COURT: I would not spend too much time on cross examination.

MR. LUPO: I have no further cross examination.

THE COURT: Very well. You may step down.

Anything further?

Plaintiff rests?

MR. RAPTES: Plaintiff rests.

THE COURT: Does the Defendant have anything?

I will be glad to hear oral argument if you wish to argue the matter. In the course of your argument I would like to have you state how you contend your structure differs from the structure of the prior art.

MR. RAPTES: Yes, Your Honor.

I will get into that immediately then. Of course for a design to be patentable the whole appearance is taken into consideration rather than the minutia.

THE COURT: Of course.

MR. RAPTES: May I step over --

THE COURT: No, just answer my question. I would like to have you point out sometime in your argument, not necessarily this minute, as to how you contend the Plaintiff's cabinet differs from the prior art. Explain it. You know, the reporter cannot get what you point to in her notebook and it will not be in the record. Now you just explain what you contend is the difference.

MR. RAPTES: Well, basically it is a question of whether it is obvious or not over the prior art.

THE COURT: It is what?

MR. RAPTES: It is obvious or not. This is the reason the Patent Office --

THE COURT: No, you are not answering my question,

I don't think. My question to you is, In what respect do you contend the Plaintiff's patent or the Plaintiff's invention differs from the prior art?

MR. RAPTES: The Plaintiff's application, the design application differs in the overall appearance in the fact that there is curvature throughout the cabinet. The door curve is around the side, over the top, and around slightly to the bottom. There is a slow curving slope to the front of the door.

THE COURT: But isn't that also true of the prior art?

MR. RAPTES: The prior art, if you will notice, has a door which really has four planes on its surface which intersect and you can see an intersection of a vertical line and a horizontal line.

THE COURT: Yes.

MR. RAPTES: The door is mainly composed of several intersecting angles. At the sides of the door you will notice a flat vertical surface which then curves into that piano hinge which is very prominent on the door of the Cosper unit.

THE COURT: You mean, do you, that the Plaintiff's structure has a continuous curve whereas the prior art structure has its curvature broken up, is that it?

MR. RAPTES: Yes.

THE COURT: Is that the difference?

MR. RAPTES: Yes, that is a basic difference.

Another difference which is apparent, the door is hinged onto a flat surface, front surface, of that cabinet whereas the front surface of the Plaintiff's cabinet is curved and the door is curved along that front surface.

THE COURT: Very well.

MR. RAPTES: As I characterized previously, we feel that the Plaintiff's design is of a teardrop shape.

Your Honor, I went into the Lavern case in my brief and quoted liberally from that case.

THE COURT: I have read your brief.

MR. RAPTES: Yes. I would probably be repetitious at this stage then but the salient point in the Lavern case is basically the test of obviousness, is a visual test to the ordinary intelligent man looking at both units.

THE COURT: That is just it. That is the test I was mentally using and that is why I asked you to tell what was the difference between the two designs.

MR. RAPTES: The other point I wish to bring up at this stage is the evidence we submitted with respect to the commercial success of the unit and the copy. Now I have cited cases in my brief with respect to commercial success. I think I would submit that copying is a great form of flattery and in this case here was a successful design and we had competitors that copied it. Basically the only test

is the visual test, is the one obvious over the other.

I might add the question would be, would a consumer be confused between the two cabinets? We submit there would be no confusion whatever, it is an entirely different design.

THE COURT: Mr. Lupo.

MR. LUPO: Your Honor, I would agree with Mr. Raptis that the test is inherently a visual one but I believe that it is also very important to remember that the Examiner and the Board of Appeals in this case did not have the opportunity to look at the two cabinets which you see before you. The Patent Office is restricted to the record that was before it and that record is shown in Defendant's Exhibit 1 to be the drawing shown in Plaintiff's design application as well as the drawings shown in the patent of Cosper.

We submit, Your Honor, that a visual inspection of those drawings, particularly the Cosper drawing as compared to that cabinet sitting over there, will show that the drawing much more closely resembles that drawing of Plaintiff's design.

Also I would like to point out, Your Honor, in line with our cross examination that one of the Plaintiff's exhibits, either 3 or 4, which we are not certain as to which it is, shows on page 2 a white seam and a white cabinet. Now again if the test is inherently visual, this seam is practically non-distinguishable from looking at this drawing.

So in looking at the two cabinets you again see basically the same thing.

One other point I would like to make with regard to commercial success. Mr. Pappas has quoted the Graham versus John Deere case. Fed. 2d 390 states that secondary consideration as to commercial success is not --

THE COURT: It is well settled that evidence of commercial success is admissible but it is weighty only in close cases where there is a doubt as to whether there is an invention.

MR. LUPO: Yes, Your Honor.

The last point I would like to make concerns the Plaintiff's case. He relied on Lavern versus Lavern. I would like to state that in Lavern there was only a single reference, there was no showing of the difference. Here we have a secondary reference which does show that reference to the curved seam and that the physical differences in Lavern between the prior art chair and that which was on appeal were much more noticeable than they are here. The Lavern court also mentioned specifically the case we relied on in our opening statement, the in re Johnson case, and made it quite clear that the facts there were clearly distinguishable from the Johnson facts.

I have no further comments, Your Honor.

THE COURT: Do you wish to say anything in reply?

MR. RAPTES: Your Honor, if I may, I think the Lavern case is pertinent. I don't know if you had a chance to look at it but they do have the drawings of the two chairs in the reported decision, and if you would like to look at them to notice the differences involved there --

THE COURT: For what point are you citing that?

MR. RAPTES: That is our basic case.

THE COURT: What is your point?

MR. RAPTES: I wanted you to see the difference in the two chairs in that case where they did issue the patent on that particular design.

THE COURT: I mean for what proposition of law are you citing this case?

MR. RAPTES: The case basically dealt with the obviousness question which they resolved down to the visual test, and in this I am merely trying to compare that case where there were two chairs that were very similar yet they held that design was patentable. I thought maybe it might help you to make comparisons with these two cabinets.

OPINION OF THE COURT

THE COURT: This is an action under 35 U.S. Code 145 for a review of the decision of the Patent Office rejecting an application for a design patent on a steam bath, the application being No. D2065 and filed on April 29, 1966.

Substantially the design consists of the outer

appearance of the article of manufacture itself and the patentable feature is said to be the particular kind of a curve of the door of the steam bath. The Court sees no reason for differing from the decision of the Patent Office that there is no patentable distinction between the prior art reference, patent to Cosper issued on March 21, 1961, Design No. 189951, and the applicant's design.

Both the Examiner of the Patent Office and the Board of Appeals of the Patent Office held that in view of the prior art the subject matter of the application is obvious to a person reasonably skilled in the art. In other words, the difference between prior art structures and the structure of the applicant is in the particular shape or type of curve. It seems to the Court that that is a matter of ordinary mechanical skill in the particular line of work and could be worked out as a matter of routine.

The Board of Appeals added the observation that design patentability cannot be predicated on a design which is so slightly different from the prior art that close examination is required to reveal differences. The Court sees no reason for reversing the decision of the Patent Office. The Court might add this additional observation, that entirely irrespective of the prior art the Court views this alleged invention as not the product of the inventive faculty at all but the product of ordinary mechanical skill.

Counsel may submit proposed findings of fact and conclusions of law.

Judgment will be rendered dismissing the complaint on its merits.

(Whereupon, at 2:22 p.m., the proceedings in the foregoing matter were concluded.)

- - -

Certified as the official transcript of the oral opinion of the Court.

Annabelle Short
Official Court Reporter

United States Patent Office

Des. 189,951
Patented Mar. 21, 1961

189,951

STEAM BATH CABINET

Dale L. Cosper, 710 N. Brookfield St., South Bend, Ind.

Filed Mar. 8, 1960, Ser. No. 59,669

Term of patent 14 years

(Cl. D83-1)

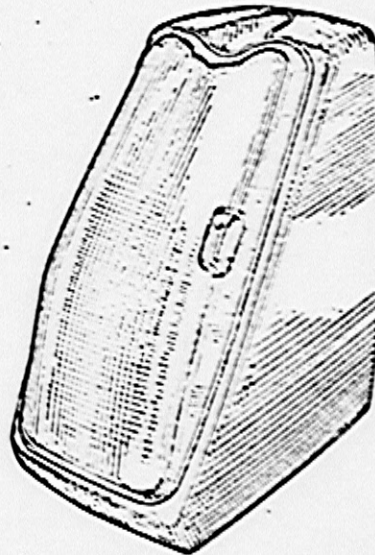
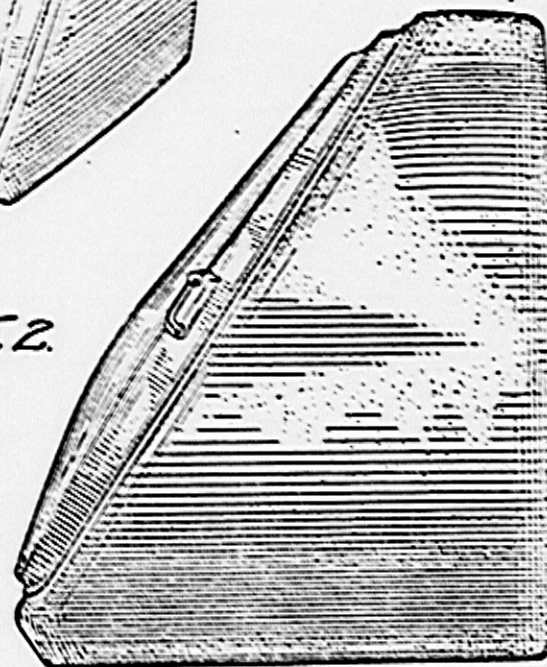


Fig. 1

Fig. 2



Des. 189,951

PAGE 2

Fig. 3.

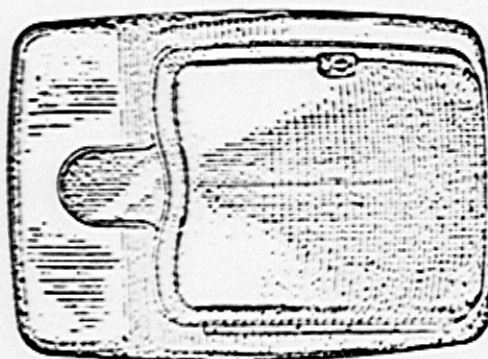


Fig. 4.

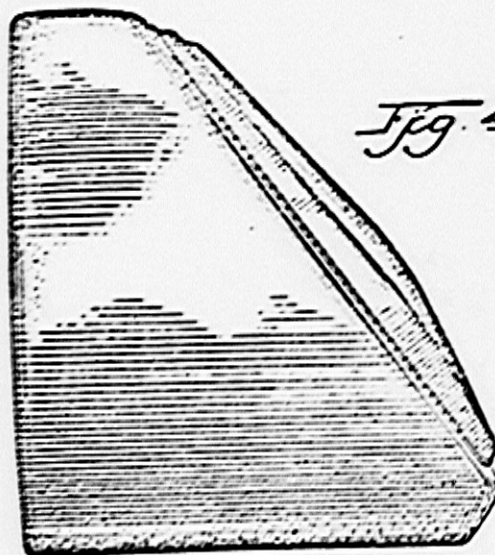


Figure 1 is a front perspective view taken from the top and from the handle side of a steam bath cabinet embodying my new design;

Figure 2 is an elevational view of the handle side of the cabinet of Figure 1 on an enlarged scale;

Figure 3 is a top plan view thereof; and,

Figure 4 is an elevational view of the hinge side of the cabinet.

I claim:

The ornamental design for a steam bath cabinet, as shown.

References Cited in the file of this patent
UNITED STATES PATENTS

D. 119,943	Shumaker	Apr. 16, 1940
180,328	Curron	July 25, 1876
2,108,268	Petersime	Feb. 15, 1938

OTHER REFERENCES

Domestic Engineering, August 1938, page 68, bottom left.

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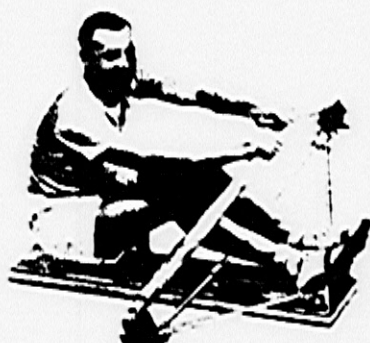
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(For More Information Circle No. 59 on Page 163)

DEFENDANT'S EXHIBIT 1 - EXAMINER'S ANSWER

Examiner's Answer

This is an appeal from the rejection of the following claim:

The ornamental design of a steam bath as shown and described.

The references of record relied upon are:

D. 189,951 3-1961 Cosper D 4-4

The Sporting Goods Dealer, July 1958, page 59, Steam Bath at upper left (Copy in Scientific Library).

It is noted that the rejection has been appealed despite the fact that it was not made final. However, since this application is a continuation-in-part of an earlier filed application and was rejected on the same prior art, appeal at this time does not appear to be premature.

THE CLAIMED DESIGN

Appellant's claimed design for a steam bath is a cabinet which is comprised of essentially vertical side and rear walls, and a front which is tapered from bottom to top. The top and bottom are substantially flat while the sides, rear, front surface and door are gently curved, or "molded", and all surfaces except for the door blend into each other as curves. The door follows the curved contour

DEFENDANT'S EXHIBIT 1 - EXAMINER'S ANSWER

of the front, and extends over a small portion of the arcuate opening in the top.

THE PRIOR ART

Cosper Patent D-189,951 discloses a steam bath cabinet which is comprised, as in appellant's design, of essentially vertical side and rear walls, and a front which is tapered from bottom to top. The top and bottom are substantially flat, while the sides, rear and door are gently curved, or molded, and all surfaces including the door but excepting the front surface blend into each other as curves. The top of the door has an arcuate depression which coincides with the opening in the top.

The Sporting Goods Dealer Item is a steam bath having essentially flat sides and top, while the front surface and door taper, in unison, from bottom to top and are also curved outwardly.

THE REJECTION

The claim has been rejected as unpatentable under 35 USC 103 over Cosper taken with the Sporting Goods Dealer Item. It is the Examiner's position, as stated in the rejection, that the claimed design and the Cosper design are strikingly similar, with the differences between them being minor, and further obvious. The differences are believed to be shown by the secondary reference, the

DEFENDANT'S EXHIBIT 1 - EXAMINER'S ANSWER

Sporting Goods Dealer Item.

In particular, both the Cosper design and the design on appeal are substantially the same. Each is comprised of the same elements and surfaces, arranged in the same manner: vertical side and rear walls, flat top and bottom surfaces, a front which tapers from bottom to top, an arcuate opening at the top which extends into the door opening on the front surface, beaded edges on the doors and door openings, and the proportions of the surfaces are the same. Thus, the two designs differ only on the front surface where it meets the door, the appellant's design being curved.

The Sporting Goods Dealer steam bath shows that it is old in the art to make the tapered front surface of a steam bath arcuate and to consequently have the door follow the curve of the front surface, or vice-versa. Hence, it is not seen that it would be unobvious to a person having ordinary skill in the art to make the front surface of the Cosper design follow the arcuate contour of the door, in the manner taught by the Sporting Goods Dealer Item.

APPELLANT'S ARGUMENTS

Appellant concentrates his arguments on the door portion of his design as compared to Cosper, with particular emphasis on the alleged "harsh impression due to the many intersecting surfaces which

DEFENDANT'S EXHIBIT 1 - EXAMINER'S ANSWER

form many angles" of the Cospers design. Appellant also points out the flat front surface aspect of the Cospers article.

It is believed that appellant is arguing matters of degree and not of substance. While the degree of curvature in the two designs may be slightly different, the impressions which they convey remain the same. It is noted that the reproductions of the Cospers Figures 1 and 2 have had straight lines superimposed. A study of the Cospers Patent will show that all exterior surfaces of the door are arcuate, and more importantly, convey this effect. It should be noted that the shading on the door as shown in Figures 1, 2 and 3 definitely indicates the door to be arcuate in both vertical and horizontal aspects and, as shown in Figure 2, the outermost vertical edge is a slow, integrated curve.

The Examiner agrees that the front surface of the Cospers cabinet, in the area where it joins the door, is flat, but it is believed that the obviousness of making the rear of the door arcuate and consequently the front surface of the cabinet is evidenced by both the front surface of the Cospers door and by the Sporting Goods Dealer Item. The fact that the Cospers door outer surface and all other surfaces of the article are arcuate is believed to be evidence that making

DEFENDANT'S EXHIBIT 1 - EXAMINER'S ANSWER

the sole flat surface thereof also arcuate would be obvious. Nevertheless, as stated in the rejection, the teachings of the Sporting Goods Dealer Item are believed to be valid for making the mating surfaces of the cabinet and door uniformly curved.

Appellant contends that the issue herein is in line with the decision of the CCPA in *In re Laverne and Laverne*, 148 USPQ 674. The rejection is not seen to be contrary to this decision because (a) the over-all appearance or impression created by the instant design remains strikingly similar to the Cosper design. (b) the differences between the two designs are limited to only one surface of the five which are visible, and (c) a secondary reference is cited and applied to show that the difference would be obvious to a person having ordinary skill in the art.

APPELLANT'S ADDITIONAL ARGUMENTS

It is alleged that the instant design has found commercial success and that competitors have copied the design. The latter allegation is immaterial to the issue on appeal.

The statements alleging commercial success are only allegations since no evidence was submitted with the affidavit filed February 28, 1967. Nevertheless, since the issue of obviousness

over the prior art is not in doubt, commercial success has not been considered. In re Kemper M. Hammell, 811 O.G. 8.

For the foregoing reasons, the final rejection of the claim as unpatentable under 35 USC 103 is believed to be proper and in order.

DECISION OF BOARD OF APPEALS

We have carefully reviewed the record herein and as a result thereof we find no reversible error in the Examiner's holding that the subject matter of the claims on appeal is made obvious to one ordinarily skilled in the art by the prior art.

* * * * *

We need to add nothing more to what the Examiner has stated, except to point out that design patentability cannot be predicated on a design which is so slightly different from the prior art that close examination is required to reveal the differences.

The decision of the Examiner is affirmed.

PLAINTIFF'S EXHIBIT 1 - SPECIFICATION

EXCERPTS FROM PLAINTIFF'S EXHIBIT 1, FILE WRAPPER OF
HORTON DESIGN PATENT APPLICATION SERIAL NO. D-2065

SPECIFICATION

To the Commissioner of Patents:

Your petitioner, Howard P. Horton, a citizen of the United States and a resident of Sarasota, Florida, whose post office address is 1154 Westway Drive, Sarasota, Florida, prays that letters patent may be granted to him for the term of fourteen years for the new and original design for

STEAM BATH

set forth in the following specification.

Be it known that I, Howard P. Horton, have invented a new, original, and ornamental design for STEAM BATH, of which the following is a specification, reference being made to the accompanying drawings, forming part hereof.

Figure 1 is a perspective view of a steam bath showing my new design;

Figure 2 is a perspective view of the steam bath with the door open;

PLAINTIFF'S EXHIBIT 1 - SPECIFICATION

Figure 3 is a top plan view thereof;

Figure 4 is a vertical section taken along lines 4-4
of Figure 5;

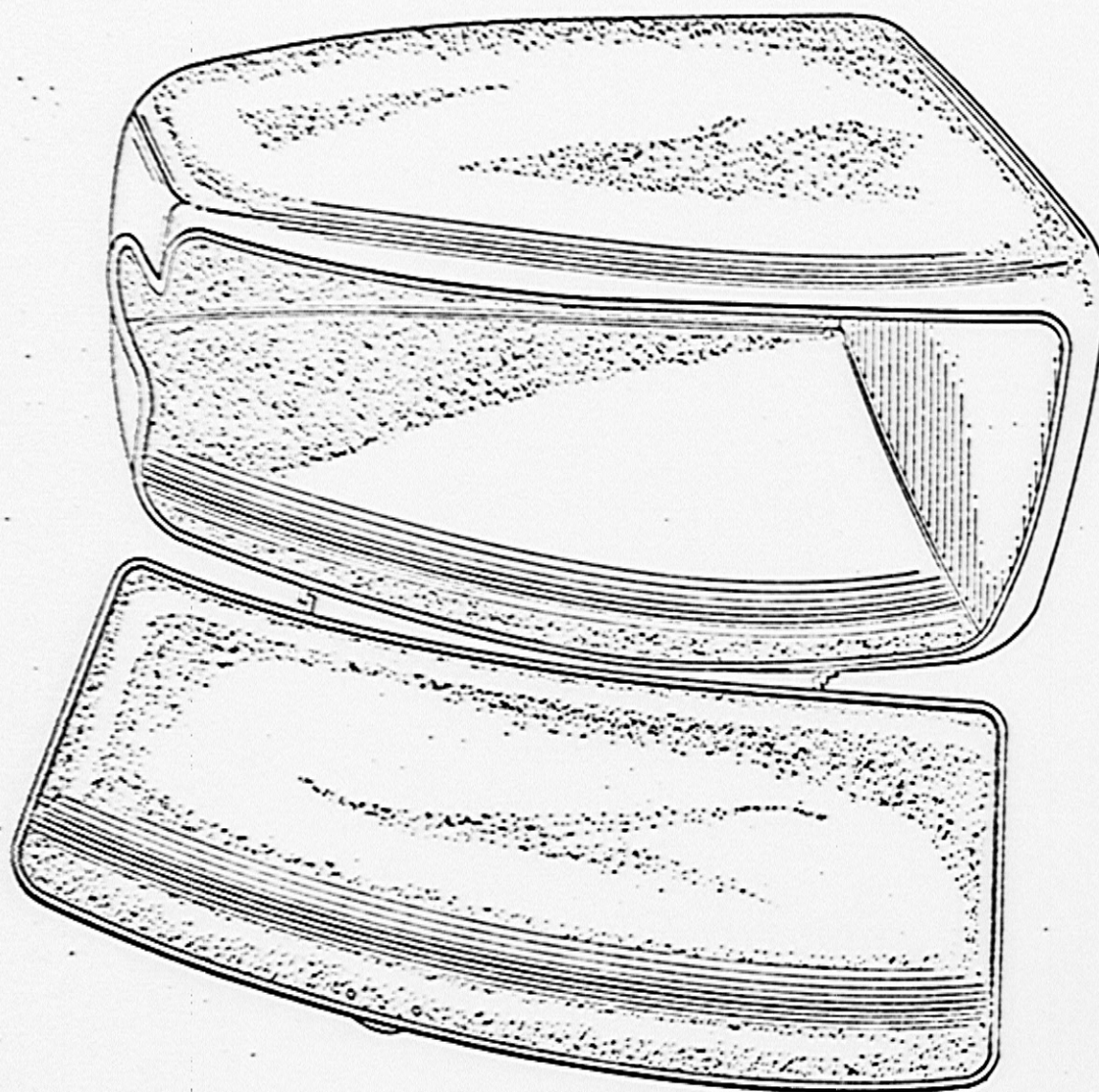
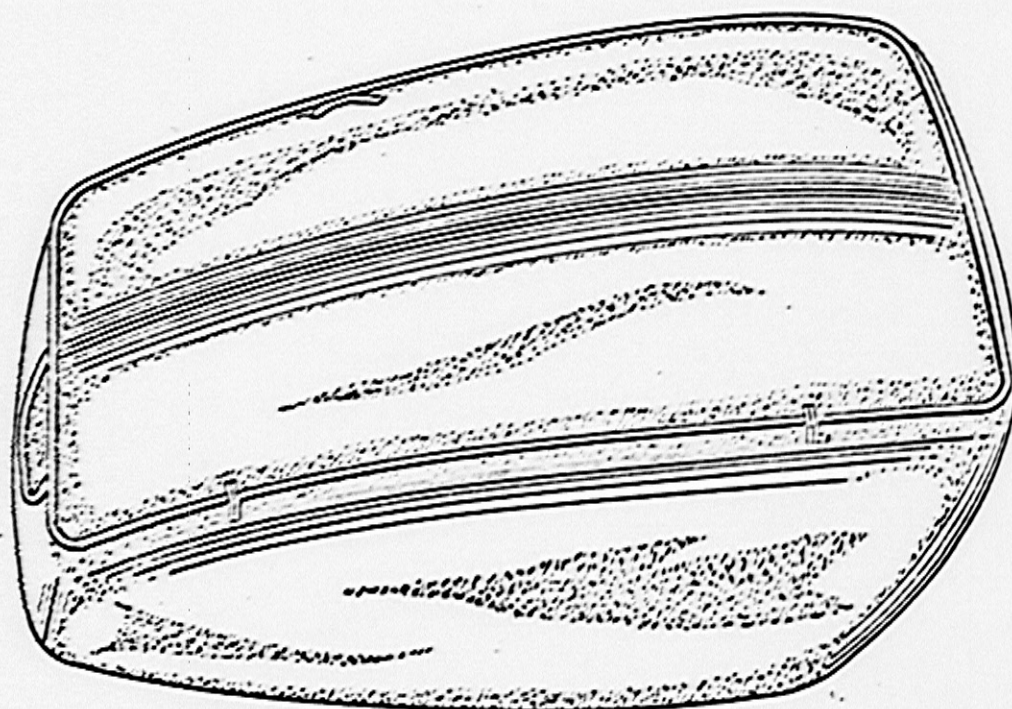
Figure 5 is a front elevational view; and

Figure 6 is a right side elevational view of the
invention.

This is a continuation-in-part of design application
serial no. D-85,812, filed June 21, 1965, now abandoned.

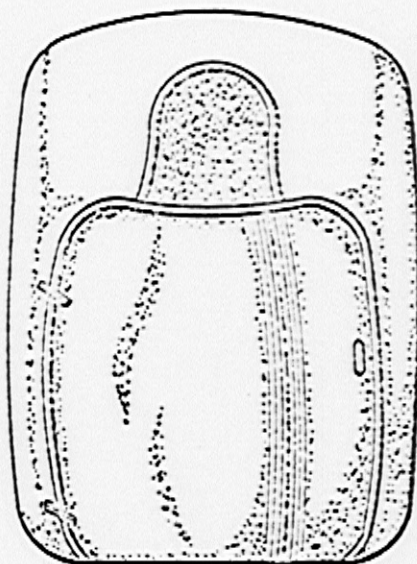
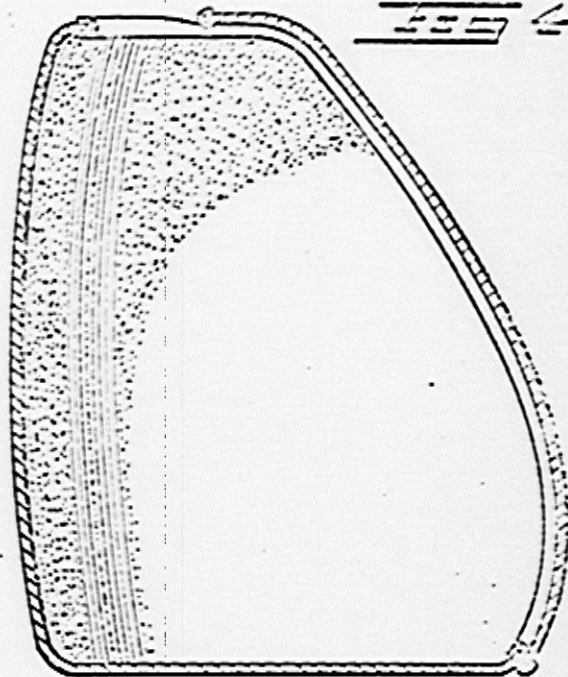
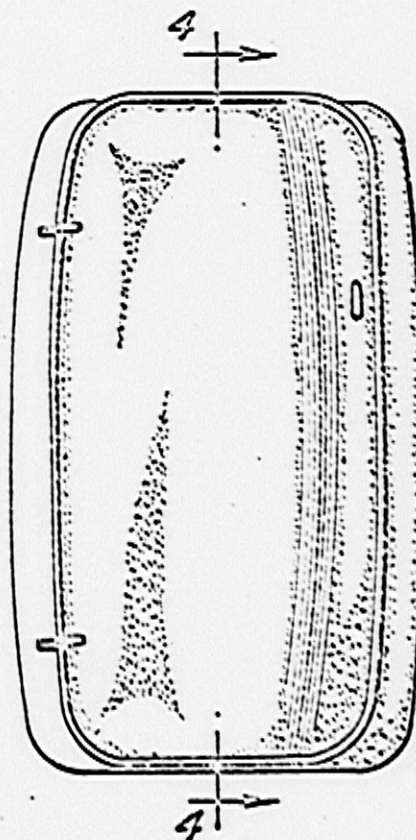
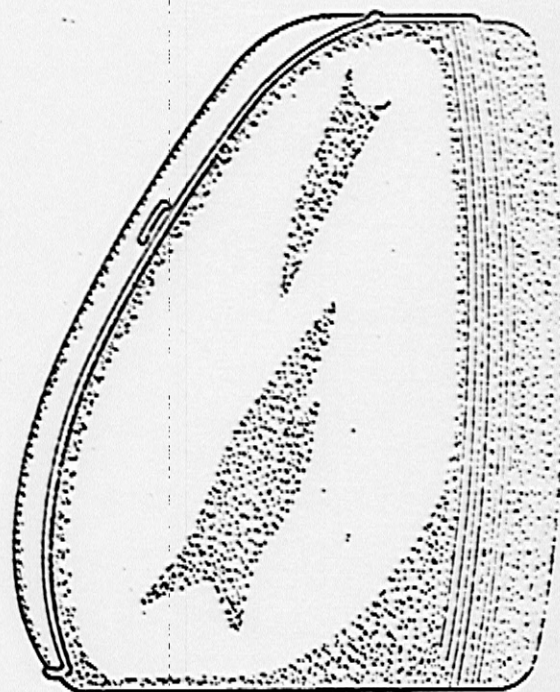
I CLAIM:

The ornamental design of a STEAM BATH as shown
and described.

PLAINTIFF'S EXHIBIT 1 - DRAWINGSFig. 2.Fig. 1.

INVENTOR

HOWARD P. HORTON

PLAINTIFF'S EXHIBIT 1 - DRAWINGSFIG 3.FIG 4.FIG 5.FIG 6.

INVENTOR

HOWARD P. HORTON

Enjoy luxurious, relaxing, refreshing
steam vapor baths at home—in your own

Battle Creek
NUSAUNA®



BEST COPY A

from the original b

Here's an ancient health and beauty aid in an exciting new concept for moderns — men, women, all the family ■ You need only try Battle Creek Nusauna steam vapor baths ■ See how they refresh the body. Stimulate circulation. Cleanse the pores. Increase elimination. Soften the skin. Help you relax. Let you step out ready for a cool shower — buoyant, zestful, feeling like new! ■ And now you can choose your Nusauna from two better-than-ever new models — Deluxe and Standard ■

... a delightful idea for your own home! Because you now command the luxurious benefits of Battle Creek *Nusauna* steam baths anytime you please. And at modest cost.

You'll find *Nusauna* baths *wonderful* for relieving nervous tensions and fatigue caused by the day's many pressures. Like the steam baths popular the world over since ancient times, *Nusauna's* safe, pleasant, moist heat produces a gentle, thorough body heat. This relaxes the capillaries... increases respiration... opens the pores. And it stimulates the healthful elimination of waste products through the skin. As you breathe only clean room air *outside* the cabinet, the lungs assist in elimination. For the skin's sake... and to ease ordinary muscular aches and soreness where steam baths help... the *Nusauna* is delightful to own.

You'll step out relaxed and refreshed after a *Nusauna* bath. Follow with a quick cool shower and you'll feel buoyed with a wonderful, buoyant sense of bodily being and comfort. You'll be ready to *look and feel your best* at any business or social event!

wonderful convenience to own

You'll find the *Nusauna* designed and priced for home office use. It's light and easily moved... yet sturdily built for years of enjoyment. It takes little space in bath, all purpose room or other suitable spot. One even watches TV while taking a *Nusauna* bath in his "health corner!"

operate it almost anywhere

Nusauna needs no plumbing... no special wiring! It runs on ordinary house current. Just plug it into the nearest grounded wall outlet. Although it will pass through any narrow door, it's roomy enough to seat a large man in comfort. For an average bath, less than a pint of water is converted into steam. This is harmless, less humidity than a tea kettle on the range releases.



For smart, modern living at its best... put a *Nusauna* at the poolside! Family and guests here enjoy a Battle Creek Prima cycle, too.

AVAILABLE

sound volume



Both Nusauna models have these quality features:

■ *Sturdy, built-in cabinet* — built-in for permanent use, or portable for use in any room.

■ *Steam vapor* — built-in for permanent use, or portable for use in any room.

■ *Easy to use* — built-in for permanent use, or portable for use in any room.

■ *Comfortable* — built-in for permanent use, or portable for use in any room.

■ *Relaxing* — built-in for permanent use, or portable for use in any room.

■ *Easy to clean* — built-in for permanent use, or portable for use in any room.

■ *Easy to store* — built-in for permanent use, or portable for use in any room.

■ *Easy to move* — built-in for permanent use, or portable for use in any room.

■ *Easy to use* — built-in for permanent use, or portable for use in any room.

■ *Easy to clean* — built-in for permanent use, or portable for use in any room.

■ *Easy to store* — built-in for permanent use, or portable for use in any room.

■ *Easy to move* — built-in for permanent use, or portable for use in any room.

■ *Easy to use* — built-in for permanent use, or portable for use in any room.

■ *Easy to clean* — built-in for permanent use, or portable for use in any room.

■ *Easy to store* — built-in for permanent use, or portable for use in any room.

■ *Easy to move* — built-in for permanent use, or portable for use in any room.

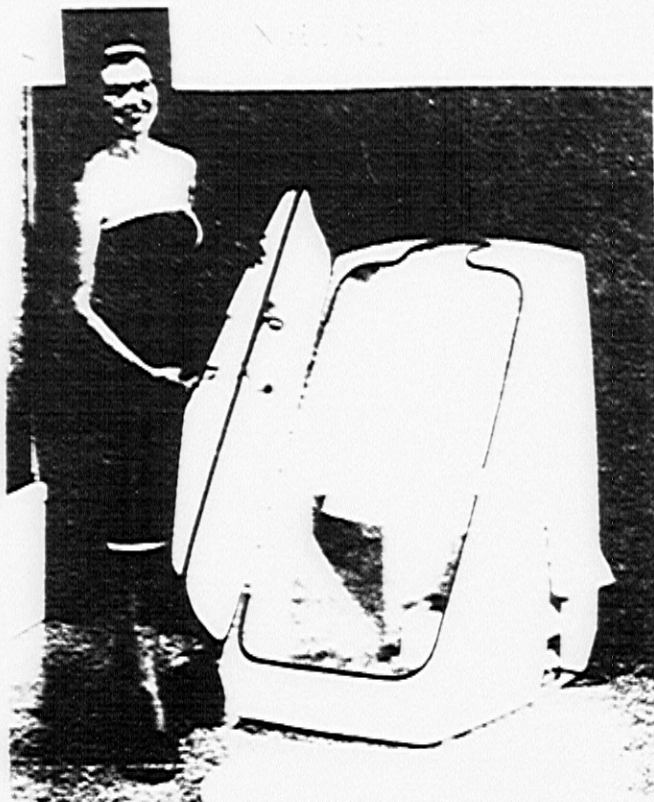
■ *Easy to use* — built-in for permanent use, or portable for use in any room.

■ *Easy to clean* — built-in for permanent use, or portable for use in any room.

■ *Easy to store* — built-in for permanent use, or portable for use in any room.

■ *Easy to move* — built-in for permanent use, or portable for use in any room.

■ *Easy to use* — built-in for permanent use, or portable for use in any room.

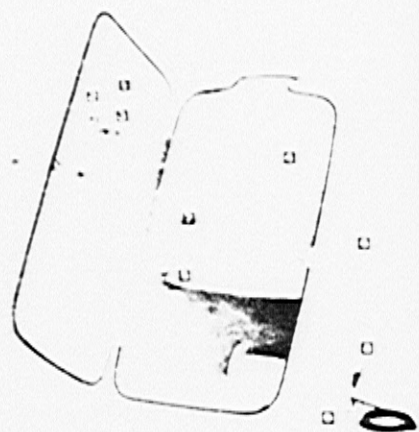


Both Nusauna models have these quality features:

Enjoy wonderful steam vapor baths in your home — so easy with a modern BATTLE CREEK

Nusauna

Both Nusauna models have these quality features:



The All New Deluxe Nusauna brings you nine additional new features for comfort and convenience.

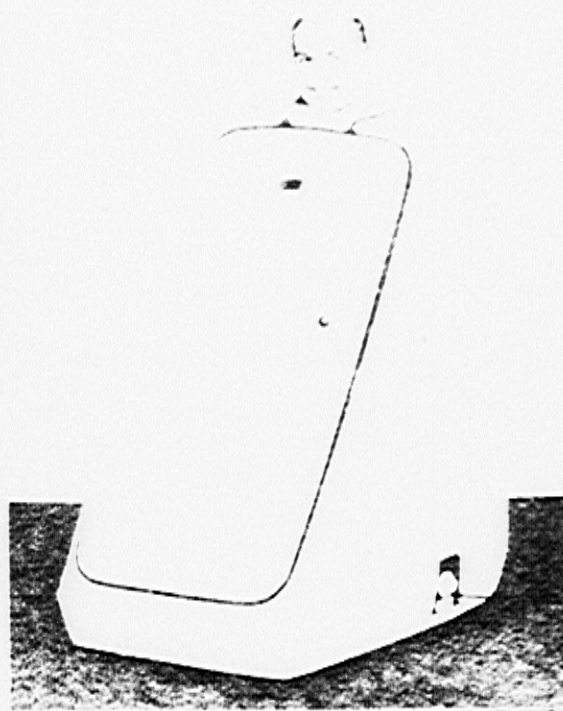
Now the All New Deluxe brings you superior comfort. Unmatched convenience. Thoughtful details that add the just touch of luxury to your Nusauna bath. Look at these extras — they give you a night's sleep.

- 1 New! Smartly sculptured inset mirror. It holds the new face mask right below your eyes, just get the mirror.
- 2 New! Easy-to-read thermometer. You can see inside when steam vapor inside has reached the temperature you like.
- 3 New! "Ready" timer and alarm series two ways. First, set the alarm when Nusauna starts heating for your bath. Then when the time your vapor bath period. When time is up, the bell will sound.
- 4 New! Restful back rest, too, provides extra comfort and support for Nusauna.
- 5 New! "Turn of head" device. It allows you to turn your head back for additional relaxation.
- 6 New! Towel rack. Two towel bars on each side hold towels always handy for a better bath.
- 7 New! Backrest armrests inside are padded for comfort, which hold your feet outside.
- 8 New! Two "feet rest" mounted in special position, into back of the Deluxe cabinet, only, make it easy to freeze to roll the Nusauna and where you want it.
- 9 New! Deluxe cabinet is 14" wider and 4" deeper than the standard. It's Deluxe for room use and comfort all the way.

Nusauna from Battle Creek... to help you look and feel "like new."



Choose from these two smart Nysauna models.

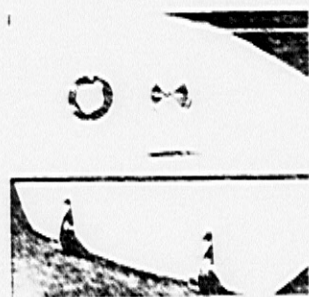


Deluxe Nusauna—for superb
comfort and convenience...

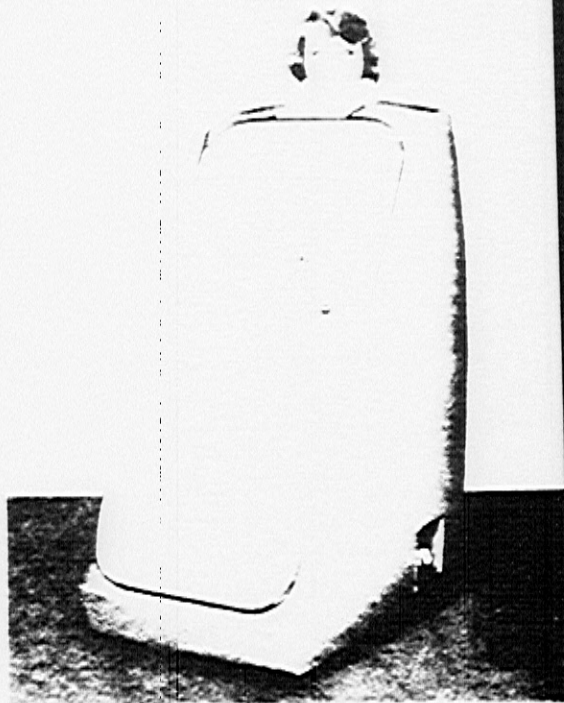
Here's everything that's modern in a steam bath for your home! In the Deluxe Nasomax, you'll enjoy maximum comfort. Smooth, fire-glass seat is contoured to fit the body. A foam cushion back rest and 3-position seat adjustment add more comfort.

Timer and thermometer, which shows heat inside, are placed just right for the user's observation. Towel bars are located in concave recesses—which also serve user as comfortable arm rests inside. Deluxe cabinet is larger for extra roominess. As an added convenience, two large, easy-to-roll casters/wheels in back permit moving the Deluxe Nissana anywhere you want it with ease. For modern steambathers, this is Deluxe living!

See also: [Coping with stress](#), [Dealing with stress](#), [Managing stress](#), [Stress management](#)



Warning: Elderly persons or those suffering from heart disease or high blood pressure should consult their physician before using the Nustina.



Standard Nisaura—Excellent quality at a modest price.

Discussion

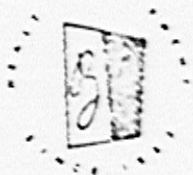
At the Nissana steam baths
in the town. Choose the model you
prefer and place your order today!

Fun and Fitness

Battle Creek

EQUIPMENT COMPANY

307 West Jackson Street
Battle Creek, Michigan 49016



Battle Creek EQUIPMENT COMPANY
307 WEST JACKSON STREET • BATTLE CREEK, MICHIGAN 49716

Area Code 616/WO 2-6183

SPECIAL INTRODUCTORY OFFER ! ! !
SAVE OVER \$50.00 !

Yes, by acting promptly you can save more than \$50.00 on the purchase of a SAUNAMIST Vapor Bath Cabinet - - the newest item in the Battle Creek line of exercise and fitness equipment.

Just imagine it ! You can enjoy a new ZEST for LIVING - - with luxurious benefits for which others have paid thousands of dollars or traveled to Finland to enjoy - - yours at a SPECIAL INTRODUCTORY PRICE.

How often do you end the day feeling tired and worn out - - knowing you have an important social function to attend in the evening, even though you feel more like dropping into bed, completely exhausted?

That's the time you'll especially enjoy your SAUNAMIST cabinet. Just 15 to 20 minutes and a cool shower after, will leave you feeling full of pep - - ready to face the evening with a new ZEST and ENTHUSIASM.

And to be doubly sure that you'll be well satisfied with the SAUNAMIST - - we're offering you a generous 10 DAY TRIAL. After it arrives, use it for 10 full days (let your friends try it too if you wish). And at the end of 10 days, if you're not fully satisfied in every way, simply send it back - - transportation charges prepaid, for a prompt refund of your purchase price.

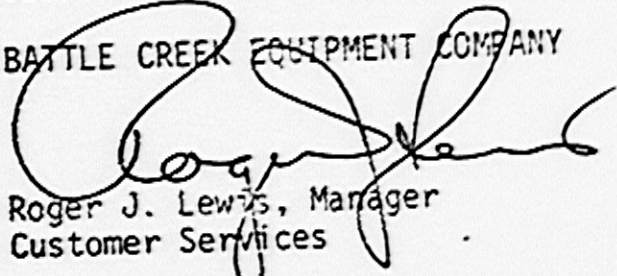
But take advantage of this bargain before the special introductory offer expires. Our low price of \$187.00 is good only until November 30, 1967 and effective December 1, the price will be \$229.50 - - the price at which this unit was designed to sell.

EXTRA SAVINGS are yours, too - - because we are paying the shipping charges. This makes the total savings over \$50.00 as we normally quote f.o.b. factory.

DON'T WAIT ! ! send your order TODAY ! We will ship at once, and in just a few short days, you'll sparkle with a new ZEST FOR LIVING that all your friends will admire and envy.

Yours for MORE FUN OUT OF LIFE,

BATTLE CREEK EQUIPMENT COMPANY

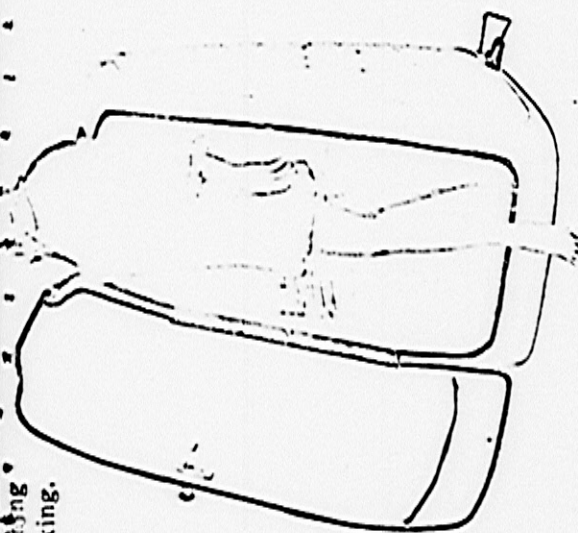

Roger J. Lewis, Manager
Customer Services

P.S. At this special introductory price, we cannot offer budget terms. After December 1, 1967 budget terms will be available at the \$229.50 price.

SPECIAL INTRODUCTORY PRICE

BEST COPY
from the original

Refreshing
& relaxing.



Now you can enjoy luxurious, convenient steam baths.

With the new SAUNAMIST you simply fill the steam generator with tap water, plug into 110V outlet, let the unit pre-heat, and you're ready to enjoy a refreshing, relaxing steam bath.

With a steam bath you can relax many of the tensions and relieve the little pains and aches that come from a lack of physical activity.

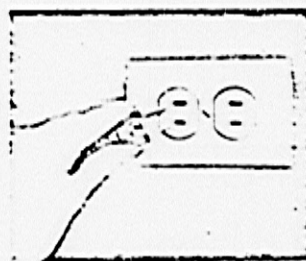
Because your head is out of the cabinet, you'll breathe only clean, fresh outside air. You never breathe the toxin-laden air inside the you would in a room-type installation. You'll encounter no problems with their air-dos.

Foragers find a steam bath opens and closes pores from the inside out. It builds complexion confidence.

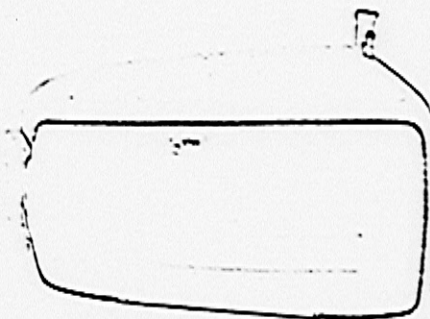
No special wiring is needed. Your SAUNAMIST can be installed any place where ordinary 110 volt electric current is available. No plumbing connections, either! Because the door is hinged, when the cabinet door is closed, there's no worry about burning feet, wallpaper or other decor.

Just like the privacy this cabinet offers, the door controls the door with a latch.

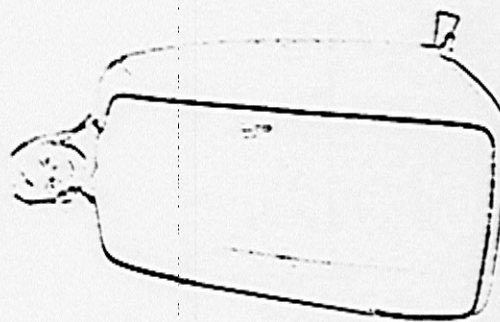
Fill reservoir



Plug in



Pre-heat



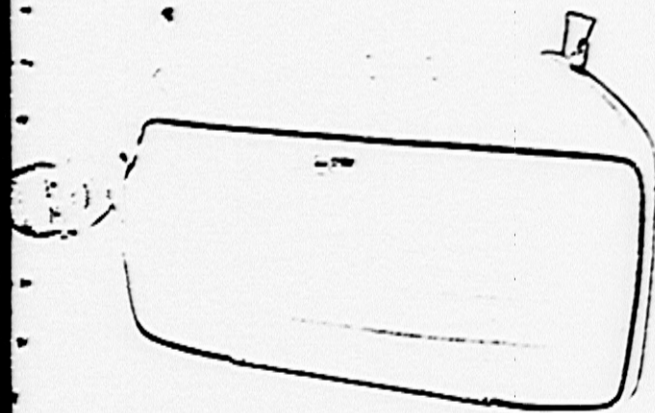
Enjoy refreshing
20 minute steam bath

1. Fill water reservoir from tap or pitcher.
2. Cover reservoir with fibre-glass baffle to protect feet from heating unit and to insure proper distribution of heat and vapor.
3. Be sure service probe cord is firmly plugged into reservoir receptacle (through cabinet side panel). Thermostat should be turned off.
4. Plug into any 110 volt outlet.
5. Turn thermostat dial to maximum setting. If in use this proves too hot for comfort, reduce setting as desired.
6. You may wish to place a towel on the seat and floor of the cabinet to absorb moisture.
7. Close the door and spread a towel over the neck opening during pre-heating. Use this towel around your neck to seal the opening during your bath.
8. After about 15 minutes of pre-heating, your cabinet is ready for steam bathing. Step in quickly to avoid heat loss. Latch the cabinet from inside.
9. Enjoy a 15 to 20 minute bath (until you begin to perspire freely).
10. Top off your steam bath with a cool or cold shower. Rub skin briskly with a towel when drying to help close pores. Following steam bathing and showering avoid sudden temperature changes. Dress warmly.

Easy maintenance

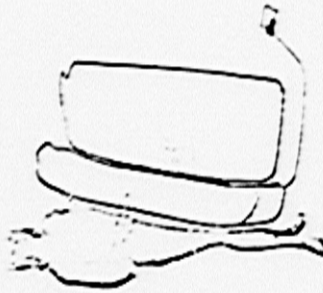
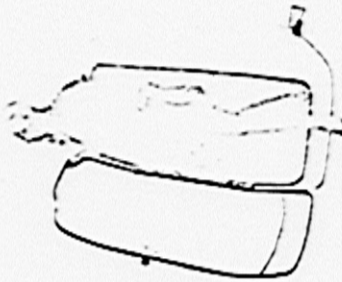
1. Wipe interior dry. Towel placed on floor will absorb most condensation.
2. Empty reservoir if unit will not be used for several days. This will reduce the accumulation of deposits. Any commercial steam iron cleaner will dissolve such deposits.
3. Never disconnect thermostat probe before turning thermostat to off position. This will avoid burning contact points.
4. Cabinet may be washed inside or out with any mild detergent. Do not use abrasive cleaners or scouring pads. Exterior may be protected with auto wax to retain lustrous finish.
5. Place the cabinet on a mat to catch any condensation gathering between cabinet and floor. Cabinet is watertight, but condensation may gather on cold floors.

SPECIFICATIONS:



Room enough
for this
6-footer!

Color: Mellow Gold
Cabinet and Door: Each is a single piece of reinforced fibre-glass.
Hardware: Rust-proof aluminum and chrome plated steel.
Seals: Extruded waterproof neoprene.
Electrical: All electric components are U.L. approved, 1000 watts, 110 volts. Thermostat, 70 inch long service cord.
Water capacity: Six quarts.
Dimensions: 45 inches high, 35 inches long, 27 inches wide.
Net weight 56 pounds
Shipping weight 62 pounds
SAUNAMIST combines the best of Finnish saunas and Turkish baths.



Man has long known the value of steam baths. Many civilizations have enjoyed and benefited from this luxury. But it took modern technology to develop a lightweight fibre-glass, sturdy, self-contained portable steam bath cabinet.

Small enough to pass through standard doorways, this cabinet will comfortably accommodate a large man. It has small outside dimensions considering the inside roominess it offers. The seat adjusts to accommodate both the tall and the small.

The SAUNAMIST steam bath cabinet offers an economical means of steam bathing. The initial cost is about \$2,000 less than with a room-type installation. And far less space has to be heated, which means savings on utility cost -- for just pennies per hour you can use and enjoy the SAUNAMIST.

Many users move their cabinet poolside and follow their bath with a bracing swim. On the way up? Because this cabinet is not a permanent installation, it can be easily shipped with your other appliances when a move is necessary.

Your steam bath can be ready whenever you want. No need to worry about busy club schedules, traffic or weather.

WARNING: Elderly persons or those suffering from heart disease or high blood pressure should consult their physician before using cabinet.

Just 20 minutes
luxurious steam bath
will relax and refresh.

You'll step
ready for action

Battle Creek EQUIPMENT COMPANY
307 West Jackson Street • Battle Creek, Michigan 49016

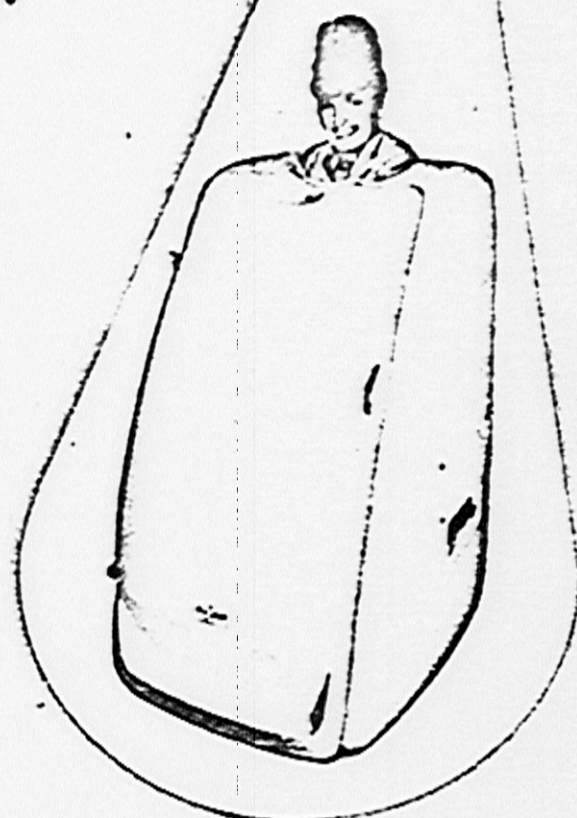
PRO SAUNA

DUAL DRY HEAT
OR
STEAM HEAT SAUNA

Here's something! A portable SAUNA cabinet that YOU can afford to enjoy.

The ProSauna is a must for every home interested in family health. Soothing steam opens and cleanses skin pores, helps relax tense muscles, calms nerves, drains excess water from fatty tissues. Thousands of overweight people are enjoying the benefits of steam baths every day. No plumbing or installation makes the ProSauna perfect for home, office, gymnasium.

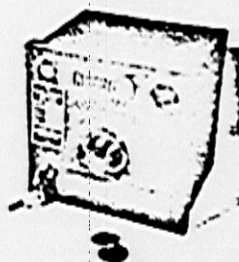
- ① Completely portable, move it anywhere you want.
- ② Built-in thermostat for perfect temperature control to suit your individual desire.
- ③ Contour seat is adjustable to 4 positions.
- ④ Door opens wide for easy access.
- ⑤ No plumbing or installation—just plug into any 110-120 volt, 60 cycle, AC outlet.



SPECIFICATIONS

CONSTRUCTION:	Fiberglass
CABINET SIZE:	45" high, 26 1/2" wide, 33" deep
SEAT:	Flexible Vinyl
COLORS:	Buff, Aqua, Petal Pink, Avocado, White or Black with Gold.
CONTROLS:	Automatic timer and thermostat
HEATER:	1465 Watts, 110 - 120 Volts
SHIPPING WEIGHT:	Approximately 75 lbs.

Would You Like to Have the Finest Portable Sauna for Your Guests — That requires No Plumbing?



THE ALMATIC CO.
Merchandising at its Best

P.O. BOX 1014
EL MONTE, CALIF.

We also have a coin-meter program available to you.
This service is a MUST for lodgings.

AVAILABLE
bound volume

PORTA-SAUNA

PLAINTIFF'S EXHIBIT 6-A

63

FEB 13 REC'D



SINCE THE DAYS OF THE ROMANS . . . Steam Baths have been the source of Relaxation, Health, and Beauty. With the PORTA-SAUNA you can enjoy the luxury of your own Steam Bath in the privacy of your home or office.

Steam Baths have endured through the ages because it is the Natural Way to . . .

★ RELAX

- ★ HELP CONTROL WEIGHT
- ★ CLEANSE YOUR SKIN OF BODY POISONS
- ★ SOOTHES TIRED, ACHING MUSCLES
- ★ SHAKE THAT "MORNING AFTER" FEELING

*A steam bath makes you feel good . . .
look younger!*

MEN LIKE THE NEW VITALITY
WOMEN, THE PHYSICAL RADIANCE!

Though Steam Baths date back many thousands of years, the Porta-Sauna Steam Bath is as "fresh as Spring" and completely modern.

★ PORTA-SAUNA is comfortable . . . the cabinet door has a molded "chin rest" for your complete relaxation . . . and our seat is contoured to fit. The three position adjustable seat permits a person of any size to use the Steam Bath comfortably.

★ PORTA SAUNA is designed for convenience . . . Lightweight — Portable — Compact. Easily moved to any location.

★ PORTA-SAUNA uses ordinary 110 Volt electrical outlet — no special wiring needed . . . no plumbing either.

★ PORTA-SAUNA is a tough, strong, fiberglass construction . . . absolutely safe, completely watertight and maintenance free. It will not rot, rust or corrode. Metal parts are stainless steel, aluminum, or chrome plated.

AVAILABLE IN FOUR LUXURIOUS COLORS

GREEN, WHITE, BEIGE, BLUE

MANUFACTURED BY



PRODUCTS CORP.

★ PORTA-SAUNA HAS A FULL ONE YEAR GUARANTEE AGAINST DEFECTIVE PARTS AND WORKMANSHIP.

PATENT APPLIED FOR

BEST COPY
from the original

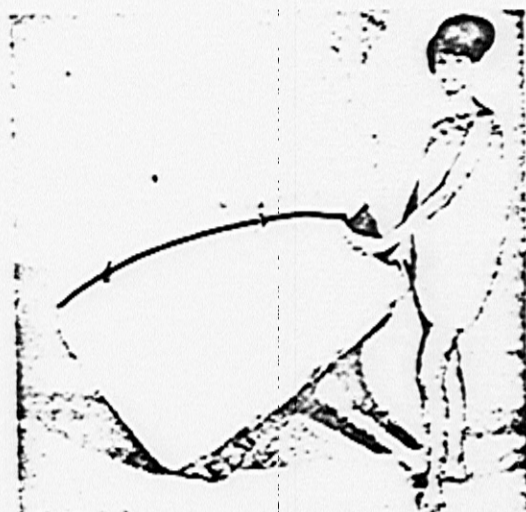


JUST PLUG IT IN . . .

PORTA-SAUNA uses any ordinary 110-volt electrical outlet. No special wiring needed. Yes . . . just plug it in.

PORTABLE . . . EQUIPPED WITH CASTERS

PORTA-SAUNA is lightweight — portable — compact. Easy to move to any location.



NO SPECIAL PLUMBING NEEDED . . . EITHER

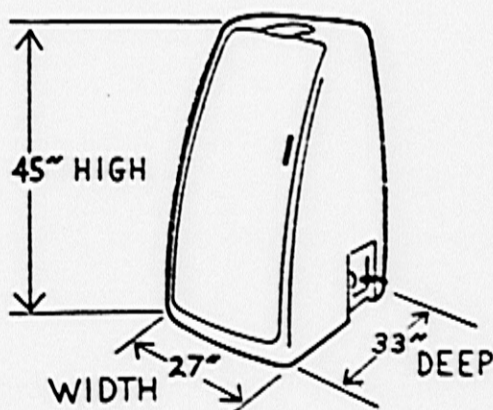
PORTA-SAUNA has a safe self-contained Steam Generator. Merely pour-in ordinary tap water, set the timer, and your own personal steam bath awaits you . . . RELAX.

YOU OWE IT TO YOURSELF TO OWN A PORTA-SAUNA

This beautiful fiberglass PORTA-SAUNA permits you to enjoy the benefits of a LUXURIOUS Steam Bath in the privacy of your home or office . . . anytime you want to RELAX . . . Equipped with an automatic timer, indicator light, and controlled thermostatically for safety. The PORTA-SAUNA automatically turns itself off when the time you set for your steam bath has elapsed.

LADIES

Your "Hair-Do" is safe when you use a PORTA-SAUNA.



COMPACT . . . YET ROOMY
Rolls thru any standard door with space to spare.

RELAX

Helps control weight. Makes you feel good, look younger . . .



Y AVAILABLE

nal bound volume

FINDINGS OF FACT

Findings of Fact

1. This is a civil action brought by plaintiff under 35 USC 145 seeking an order authorizing defendant to issue a design patent on plaintiff's application Serial No. Des. 2065, filed April 29, 1966, entitled "Steam Bath."

2. The only claim is for "The ornamental design of a STEAM BATH as shown and described."

3. The application contains six different views of plaintiff's steam cabinet, which may be described as having substantially vertical side walls and back wall, with the whole front wall taking the form of a backwardly sloping door. The inside of the door is formed to a curved surface and the seam between the door and the cabinet has a gently curved appearance. Also, all corner regions are rounded, such as to impart a "teardrop" impression according to plaintiff.

4. The prior art relied upon by the examiner and Board of Appeals in rejecting plaintiff's claim consisted of the following:

A - The patent to Cosper, No. Des. 189,951, granted March 21, 1961.

FINDINGS OF FACT

B - A publication entitled "The Sporting Goods Dealer", page 59 thereof, steam bath at upper left, dated July 1959.

5. The patent to Cosper discloses a steam bath design which may be described as having substantially vertical sidewalls and backwall, with the front wall door slanting back as does plaintiff's. The inside of the door is formed to a flat peripheral surface and the seam between the door and the cabinet has a flat appearance.

6. The "Sporting Goods Dealer" publication is directed to a steam bath design wherein the inside of the door is formed to a curved surface and the seam between the door and the cabinet has a gently curved appearance.

7. The examiner and Board of Appeals held that the plaintiff's design was unpatentable over Cosper in view of the "Sporting Goods Dealer" publication under 35 USC 103. Both concluded that plaintiff's design would be obvious to one of ordinary skill since a curved door seam was known in steam cabinet design art, as evidenced by the "Sporting Goods Dealer" publication. That publication was considered suggestive of modifying the flat door seam of Cosper to a curved shape.

FINDINGS OF FACT

8. The Board of Appeals further stated that "We need to add nothing more to what the Examiner has stated, except to point out that design patentability cannot be predicated on a design which is so slightly different from the prior art that close examination is required to reveal the difference."

9. At trial, the plaintiff introduced into evidence an actual steam bath embodying his design, as well as another steam cabinet substantially corresponding to that shown in the Cosper patent. Thus, an actual side-by-side visual comparison has been made by the Court, in addition to comparison of the respective drawings.

10. Plaintiff also adduced testimony indicating that there had been a promising number of authorized sales of steam cabinets embodying plaintiff's design, at least until alleged copies thereof by others appeared on the market.

11. Upon consideration of all the evidence, the Court agrees with the Examiner and the Board of Appeals that plaintiff's claimed design includes no unobvious differences over the prior art, principally the cabinet design of Cosper. In view of the prior art,

JUDGMENT

plaintiff's design would have been obvious to a person of ordinary skill in the art, viz. that of designing steam baths or cabinets.

Conclusions of Law

1. Plaintiff is not entitled to a design patent under 35 USC 103.
2. The complaint should therefore be dismissed.

/s/ J. Holtzoff

June 18, 1969

Judgment

This action came on to be heard at this term and thereupon consideration thereof, it is this 18th day of June, 1969.

ADJUDGED that the complaint be and it is hereby dismissed, with costs assessed against plaintiff.

/s/ J. Holtzoff



NOTICE OF APPEAL

Notice of Appeal

Notice is hereby given this 15th day of August, 1969 that Plaintiff, Howard P. Horton hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of June, 1969 in favor of Defendant, Commissioner of Patents against said Plaintiff.

No. 23,493

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

HOWARD P. HORTON,
Plaintiff-Appellant,

v.

EDWARD J. BRENNER,
Commissioner of Patents,
Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the District of Columbia

BRIEF FOR PLAINTIFF-APPELLANT

M. TED RAPTES
Attorney for Plaintiff-Appellant
1911 Jefferson Davis Highway
Arlington, Virginia 22202

Of Counsel:

MILLEN, RAPTES & WHITE
Arlington, Virginia 22202

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REFERENCE TO RULINGS

The District Court issued an opinion from the bench which is reproduced in the Appendix at pages 39-41, its judgment at page 70, and its Findings of Fact and Conclusions of Law at pages 67-70.

The present case has not been before this Court under any title.

IN THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

NO. 23,493

HOWARD P. HORTON,
Appellant - Plaintiff

vs.

EDWARD J. BRENNER, Commissioner of Patents
Appellee - Defendant

Appeal from the United States District Court for
the District of Columbia

BRIEF FOR HOWARD P. HORTON
PLAINTIFF - APPELLANT

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

The District Court erred in holding that the appellant,
Howard P. Horton, was not entitled to a design patent under
35 U.S.C. 103. The District Court erred in the interpretation

of 35 U.S.C. 103 as applied to the question of whether the appellant's design for a steam bath cabinet was obvious or not in view of the prior art. Accordingly, the District Court erred in making Findings of Fact 6, 7, 8 and 11, and also in making Conclusion of Law 1.

The ultimate issue in this appeal is whether the appellant's design is obvious or not under 35 U.S.C. 103 and what tests should be applied to determine the question of obviousness.

STATEMENT OF THE CASE

The appellant, Howard P. Horton, filed a design patent application on April 29, 1966 in the United States Patent Office for a design on a steam bath cabinet which received Serial Number D-2065 (App. pp. 51 to 54). The application was duly prosecuted through the Patent Office and the Patent Office examiner refused to issue a patent on the appellant's design.

An appeal was taken to the Patent Office Board of Appeals on October 25, 1966 and in its decision dated October 18, 1967 (App. p. 50) affirmed the decision of the Examiner (App. pp. 45 to 50).

A civil action (App. pp. 2 to 7) under the provisions of 35 U. S. C. 145 was duly filed against the Commissioner of Patents in the United States District Court for the District of Columbia and a trial was held on June 11, 1969, the complete transcript of which is reproduced in the appendix at pages 8 through 41. The District Court made Findings of Fact and Conclusions of Law (App. pp. 67 to 70) holding that appellant was not entitled to a design patent under 35 U. S. C. 103, and in its Judgment (App. p. 70) dismissed the complaint. A Notice of Appeal (App. p. 71) was duly filed in this court.

The invention sought to be patented involves a novel design for a steam bath cabinet. The design is depicted in the drawings (App. pp. 53, 54) submitted with the appellants patent application. At the trial, an actual cabinet embodying the design was presented in evidence as Exhibit No. 2 (App. p. 20).

The appellant also presented evidence of commercial success and copying of the design by competitors (App. pp. 21, 22, 26 to 29) and introduced into evidence copies of competitors brochures embodying appellant's design. Exhibits 4, 5, 6A and 6B (App. pp. 59 to 66).

The Patent Office introduced into evidence prior art (App. pp. 42 to 44) which the Patent Office Examiner and the Board of Appeals relied on to refuse to grant the appellant a design patent. The only basis for refusing the patent was that the appellant's design was obvious under 35 U.S.C. 103 in view of the prior art.

The appellant also introduced into evidence an actual cabinet, Exhibit 7, (App. pp. 29, 30) which embodied the design of a cabinet of the prior art. Thus an actual side by side comparison of appellant's cabinet, Exhibit 2, and that of the prior art was available to the trial court. Exhibits 2 and 7 are not included in the printed appendix because of their bulk but will be presented under Rule 7 (b) of the General Rules of this court.

The trial court in holding in Conclusion of Law 1 that appellant was not entitled to a design patent gave its reasons in its opinion (App. pp. 39 to 41). This appeal is based on the reasoning set forth in the opinion and the incorrect application of the test for obviousness under 35 U.S.C. 103. Essentially, the trial court reasoned that appellant's design was obvious in view of the prior art, specifically the Cosper Design Patent No. 189,951, in that ordinary mechanical skill was involved and the appellant's design could be worked out as a matter of routine.

ARGUMENT

Appellant respectfully submits that his design for a steam bath cabinet is not obvious in view of the prior art and is therefore entitled to patent protection.

Patentability of designs is provided for in the Patent Statutes in 35 U.S.C. 171 which reads:

"Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.

The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided."

The sole issue on the patentability of appellant's design is the question of obviousness under 35 U. S. C. 103 in view of the prior art cited by the Patent Office. The Patent Office Solicitor did not refer to any other statutory grounds of rejection in the District Court proceedings. Accordingly, on the patentability issue, novelty under 35 U. S. C. 102 was not questioned.

Stating the issue in the words of the statute 35 U. S. C. 103, it is whether

"***the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

The resolving of the knotty issue of obviousness therefore, hinges on:

1. The prior art to which the subject matter pertains.

2. Person having ordinary skill in the art.
3. Subject matter sought to be patented as a whole.

With respect to the prior art, it must pertain to the ornamental design art since the inventors of designs are designers in the fields of industrial designs.

With respect to (2), the "person having ordinary skill", the immediate thought would be that it would be one who is skilled in the field of designs. However, the courts have determined that it need not be, reasoning that the test is inherently a visual one and no special skill is required to determine what things look like even though individuals react differently. In re Laverne and Laverne, 356 F2d 1003, (CCPA) (1966). Further, as stated in In re Johnson 175 F2d 791, (CCPA) (1949), the judge is considered as an "average observer" and the test of patentability resides as a subjective standard in the mind of the judge.

With respect to the subject matter sought to be patented, it is imperative that the design be viewed as a whole and not merely portions of it when comparing it with the prior

art. In re Jennings, 182 F2d 207 (CCPA) (1950). However as a practical matter, the comparison must of necessity involve the observance of parts of the respective designs in determining whether or not there are differences.

In the instant case, the appellant's novel design for the steam bath cabinet is characterized in its overall ornamental features in having a somewhat teardrop shape with all junctures of the side walls, top, bottom and door being curved. The appellant testified that he designed the cabinet with the idea of it being streamlined, attractive and marketable (App. p. 19). Furthermore, he was striving for curves and smooth effect which would be ornamental as well as utilitarian (App. p. 20). It is submitted that the full overall effect of the design cannot be effectively depicted in the drawings which were submitted and only by observing the actual cabinet can the aesthetically pleasing and unexpectedly dramatic flair of the design be appreciated.

The prior art cited by the Patent Office involves the design of a steam bath cabinet of the Cosper Design Patent (App. pp. 42, 43). The appearance or overall impact of the Cosper design leaves one with an impression of boxiness due

to its many intersecting angular lines. It was characterized by appellant's witness as being angular in design, all straight lines, and with 90 degree turns in most cases, or nearly so (App. p. 30).

The Patent Office also cited The Sporting Goods Dealer (App. p. 44) to show a cabinet having a door which curves outwardly to provide for the deficiency of Cosper who discloses a front flat surface in the area where it joins the door. Finding of Fact 6 also found that the door of Sporting Goods is formed to a curved surface and the seam between the door and the cabinet has a gently curved appearance. A careful look at the cabinet in Sporting Goods will disclose that there is no door. The front appears to be a flexible material having a curved zipper which is used to permit entrance and egress from the cabinet. Accordingly, Finding of Fact 6 is erroneous and the cabinet of Sporting Goods is not pertinent as prior art.

The District Court in its opinion finding the appellant's

design obvious and having no patentable distinction over Cosper's design. stated that the difference was, "in the particular shape or type of curve," and, "that it was a matter of ordinary mechanical skill in the particular line of work and could be worked out as a matter of routine". Further, the court opined that "the alleged invention was not the product of inventive faculty at all but the product of ordinary mechanical skill".

It is submitted that the lower court erred in basing its determination of obviousness on mechanical skill. Designs are not created by using mechanical skill, but rather by aesthetic skill and artistic conception. There is no evidence to establish that appellant approached the design from a mechanical standpoint. However, it is clear that the approach was from an attempt to produce an aesthetically pleasing design. That appellant succeeded in his attempt is established by the fact that it was commercially successful (App. pp. 21, 22, 23). In fact, it was so commercially successful that competitors copied the design as evidenced by Exhibits 4, 5, 6A (App. pp. 21, 22, 27, 28, and 60 to 66). The manufacturer, Battle

Creek Equipment Company, of the prior art Cosper cabinet, a brochure of which became Exhibit No. 3 (App. pp. 25, 55 to 58), also copied the appellant's design as evidenced by a brochure, Exhibit No. 4 (App. pp. 26, 59 to 61).

Approaching, the sole issue of this appeal, the obviousness questions, one is faced with a most difficult and perplexing problem. What standards and what specific tests are to be applied? How is some semblance of uniformity to be obtained? Is the question of obviousness always to be subject to personal opinions as such with the consequent dichotomy of results from person to person and case to case.

The Supreme Court of the United States in Graham et al v. John Deere Co. of Kansas City, et al. 383 U.S. 1. (1966) has wrestled with the problem of obviousness. Therein, it was stated that as indicia of obviousness or nonobviousness, certain inquiries may have relevancy as follows:

"***Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy."

It is submitted that a further inquiry on the obviousness question aside from commercial success would be one involving imitation and copying. Cases have held that there is an added presumption of patentability (unobviousness) from the imitation of an article. Kurtz v. Belle Hat Lining Co., Inc. 280 F. 277, 281. (2 Cir. 1922); Ackermans v. General Motors Corp. 202 F. 2d 642. (4 Cir. 1953).

The lower court in this case apparently did not take into consideration the evidence of commercial success and copying since its opinion makes no mention thereof. It is submitted that on the question of obviousness that the "secondary" considerations should be carefully evaluated along with the prior art. This is not to urge that the secondary considerations alone could establish non-obviousness, but rather that secondary considerations be given more evidentiary weight in determinations under 35 U.S.C. 103.

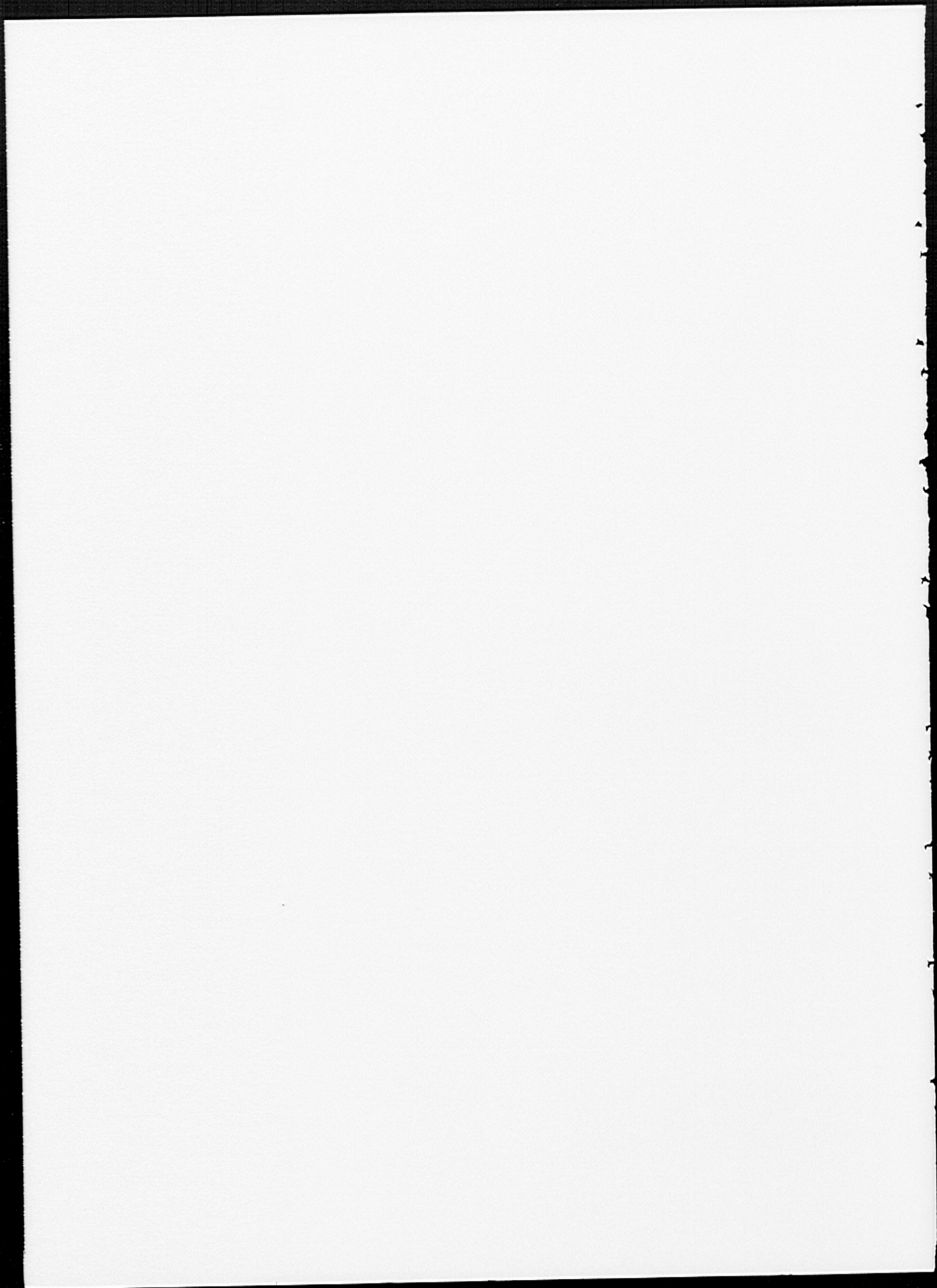
In the instant case, appellant's design requires a judgment determination when compared with the Cosper design. Does one determine if mechanical skill was involved? No. The

determination to be made is one of comparison of the respective designs to ascertain whether or not a competent designer would perfunctorily change the Cosper design to the appellant's design. In so considering, copying by competitors would be a compelling argument that the design was not a perfunctory one. Further, commercial success of a design raises the presumption that the design was considered aesthetically pleasing in its appearance to the buying public.

In light of the above, it is submitted that appellant's design is not obvious and the lower court erred in its determination in finding it obvious.

CONCLUSIONS

Arguments have been presented which should establish that appellant's design is not obvious in view of the prior art. It is respectfully urged that this honorable court ought reverse the judgment of the District Court and direct the appellee-



defendant to issue to the appellant - plaintiff a design patent.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing
plaintiff-appellant's brief was personally delivered to the
attorney for the defendant-appellee on this fifth day of
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